TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 208.

SAMUEL LEWIS, PETITIONER,

vs.

G. OLIVER FRICK, UNITED STATES IMMIGRATION INSPECTOR, &c.

N WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 13, 1912.
CERTIORARI AND RETURN FILED APRIL 22, 1912.

(23,086)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1913.

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CERTIFIED COPY.

In the United States Circuit Court of Appeals, Sixth Circuit.

No. 2200.

G. OLIVER FRICK, United States Immigration Inspector in Charge, Appellant,

vs.

SAMUEL LEWIS, Appellee.

Record.

On Appeal from the United States Circuit Court for the Eastern District of Michigan, Southern Division.

Frank H. Watson, United States Attorney; J. Edward Bland, Assistant United States Attorney, Attorneys for Appellant.
Florian, Moore & Wilson, Attorneys for Appellee.

Filed Jul- 11, 1911. Frank O. Loveland, Clerk.

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TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

In the Matter of the Petition of SAMUEL LEWIS for Writ of Habeas Corpus.

(Filed April 13, 1911.)

To the Honorable District Judge:

Your petitioner, Samuel Lewis, respectfully represents that he is a laborer, a person of Jewish Ancestry, and a lawful resident of the United States.

That on November 24th, 1910, in the City of Detroit, in said District, your petitioner was arrested by United States Immigrant Inspector, Leonard S. Coyne, upon a Department (Telegraphic) warrant of arrest, issued out of the Department of Commerce and Labor of the United States, by the acting Secretary thereof, and dated, November 23rd, 1910, charging that your petitioner is an alien; that he entered the United States on November 17, 1910, at the Port of Detroit, Michigan, via Grand Trunk Railway; that he has been convicted of, or admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry

into the United States; that he procured, imported or brought into the United States, a prostitute or woman, or girl, for the purpose of prostitution, or other immoral purposes; that at the time of his entry in the United States, he was a person likely to become a public charge, and that he is unlawfully within the United States, in that he entered without inspection.

And your petitioner further represents and shows that he is now deprived of his liberty and is detained in custody of G. Oliver Frick, United States Immigrant Inspector in charge, in the County Jail, at said City of Detroit.

And your petitioner further represents that on to-wit: the 24th day of November, A. D. 1919, while under arrest and con-
2 finement as aforesaid, United States Immigrant Inspector, Leonard S. Coyne, against your petitioner's will, and without informing him of his rights in the premises, subjected your petitioner to an oral examination, taking adjournments therefrom to November 30th, 1910, December 7th, 1910, and December 8, 1910, and that afterwards, to-wit: on the 19th day of January, A. D. 1910, while under arrest and confinement as aforesaid, United States Immigrant Inspector, Leonard S. Coyne, again subjected your petitioner to a further oral examination, a copy of the record of which said examination, marked Exhibit "A" is hereto attached.

And your petitioner further represents that his detention and imprisonment as aforesaid, is illegal and void, in this, to-wit: First, that on March 23rd, A. D. 1911, a jury in the District Court for the Eastern District of Michigan, Southern Division, returned a verdict of not guilty on an indictment against your petitioner, copy of which is hereto attached and marked Exhibit "B," containing substantially the same allegations against your petitioner as charged in warrant of arrest issued out of the Department of Commerce & Labor, and dated November 23rd, 1910, by virtue of which your petitioner is now deprived of his liberty and detained in the custody of G. Oliver Frick, United States Immigrant Inspector, in charge, as aforesaid.

Second, that said acting secretary of the Department of Commerce and Labor without authority to make and enforce the order and warrant of deportation under which your petitioner is now held, for the reason that your petitioner is a lawful resident of the United States, and as such is not subject to the surveillance and control of the Immigration Inspectors or the Department of Commerce & Labor, in that your petitioner entered the United States at the port of New York, in the State of New York, on to-wit: September 20, A. D. 1904, and was then and there examined and admitted by the United States Immigration Inspectors at that point.

Third. That your petitioner's detention and imprisonment under said order and warrant of deportation is against public policy and contrary to the laws of the United States, guaranteeing to all lawful residents thereof the rights, privileges and benefits properly appertaining and accruing to your petitioner under the guarantees of the constitution and the laws of the land.

Fourth. That your petitioner has not been committed
3 and is not detained by virtue of any judgment, decree or process, issued by a Tribunal of compe-ent jurisdiction, upon which to base and order a warrant of deportation.

Fifth. That the Department of Commerce & Labor, and the acting Secretary thereof, were without jurisdiction to hear and determine your petitioner's rights in the premises, and that the sole and exclusive jurisdiction thereof was in a Justice, Judge, or Commissioner of the United States Court.

Sixth. That said warrant and order of deportation is not preceded by nor founded upon any hearing, findings or judgment of a Court of competent jurisdiction, wherefore, to be relieved of such unlawful detention and imprisonment, your petitioner prays that a writ of Habeas Corpus, to be directed to G. Oliver Frick, United States Immigration Inspector in charge, may issue in his behalf and that your petitioner may be wholly discharged and released from his custody and imprisonment and that he may be brought forthwith before the court, to do, submit to and receive what the law may direct.

SAMUEL LEWIS,
GUY W. MOORE,
Att'y for Petitioner.

Witness:
JOHN J. SMOLENSKI.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 4th day of April, A. D. 1911, personally appeared before me, a Notary Public in and for said County Samuel Lewis, who being first duly sworn, says: that the matters and facts stated in the foregoing petition are true to the best of his knowledge, information and belief.

JOHN J. SMOLENSKI,
Notary Public, Wayne County, Michigan.

My commission expires July 14, 1914.

EXHIBIT A.

Report of Hearing in the Case of Samuel Lewis, alias Frezesuskir, alias Przysuskier, alias Nossek, alias Naess.

Minutes of Hearing in the Above Entitled Case Taken and Transcribed by Albert L. Anderson, Under Clerk.

In accordance with instructions contained in Department Telegraphic warrant of arrest, dated Nov. 23, 1910, copy of which is hereto attached, marked "Exhibit A" and made a part of this
4 record, Samuel Lewis, alias Frezesuskir, alias Przysuskier, alias Nossek, alias Nuess was taken into custody at the Wayne

County Jail, Detroit, Mich., on Nov. 24th, 1910, by Leonard S. Coyne, U. S. Immigration Inspector, who then and there conducted hearing directed on above mentioned warrant, and adjourned the case until Nov. 30, 1910. Further adjournment was made until Dec. 7th, 1910, at 3:00 P. M., and final hearing given Dec. 8th, 1910, at 3:00 P. M., at Wayne County Jail, Detroit, Mich. At the request of U. S. Commissioner of Immigration at Montreal, Quebec, Canada, contained in his letter No. 10873-997, dated Dec. 28th, 1910, an entirely new hearing was given said Samuel Lewis, alias Frezesuskir, alias Przysuskier, alias Nossek, alias Nuess on Jan. 19th, 1911, at Wayne County Jail, Detroit, Mich., at 4:10 P. M., by Leonard S. Coyne, U. S. Immigrant Inspector, in accordance with Department warrant No. 53124-7-A, dated Nov. 23rd, 1910, copy of which is hereto attached, marked "Exhibit A-2," and made a part of this record.

Said alien being able to speak and understand the English language, an interpreter was not employed.

Said Samuel Lewis, alias Frezesuskir, alias Przysuskier, alias Nossek, alias Nuess was then informed that the purpose of said hearing was to afford him an opportunity to show cause why he should not be deported to the country from which he came, it being alleged: That he is an alien, that he entered the U. S. on Nov. 17th, 1910, at the port of Detroit, Mich., via G. T. R., that he has been convicted of or admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he procured, imported, or brought into the U. S. a prostitute or woman or girl for the purpose of prostitution or other immoral purposes; that at the time of his entry into the United States he was a person likely to become a public charge; and that he is unlawfully within the United States in that he entered without inspection. Alien was offered opportunity to inspect the warrant of arrest and the evidence upon which it was issued, of which right he availed himself.

Said alien was then duly sworn and the following testimony presented:

Q. Do you understand the English language?

A. Yes.

Q. Do you wish to examine the warrant and the papers upon which it is presented?

A. (Alien takes warrant and looks it over.) A. Yes, that is all right.

Q. What is your name?

A. Samuel Lewis.

Q. Have you any other name?

A. Prezysuskier.

Q. Any other name?

A. Nossek.

Q. What is the name you went by besides Samuel?

A. That is all, Sam, all the time.

Q. You have a right to be represented by counsel at this hearing, do you wish to be so represented?

A. Sure.
Q. Have you a lawyer now?
A. Yes, sir.
Q. Is he present?
A. Sure he is.
Q. Mr. Grossman is your counsel?
A. Yes, sir.

COYNE to Grossman:

Q. What is your name?
A. Joel E. Grossman, attorney at law, No. 619 Moffat Bldg., Detroit, Mich.
Q. You are here representing this alien as his counsel?
A. Yes.
Q. How long have you been his counsel?
A. From the time of his arrest.
Q. His arrest in the matter of the U. S. District Court case?
A. No, from the time of his arrest in connection with these alien cases and all other cases that have been placed against him.

COYNE to SAM (Alien):

Q. In your testimony at another time you stated that you did not have counsel or did not wish to be represented by counsel?
A. I didn't know whether I would have or not. My relations were going to see.
Q. How old are you?
A. About 27 or 28.
Q. Where were you born?
A. Mlawa, Eocka, Gub., Russ-Poland.
Q. Are you of the Hebrew race?
A. Yes.
Q. Where was your father born?
A. I guess in the same State but in a different town.
Q. And your mother where was she born?
A. In the same State.
Q. What was your father's name?
A. Chaskel Przysuskier.
Q. And your mother's name?
A Eva.
Q. Did your father ever live in the U. S.?
A. No, sir.
Q. Is he alive or is he dead?
A. Alive and mother is too.
6 Q. Both live in the same place?
A. Yes, Mlawa.
Q. Have they any street address?
A. No, it is a small place.
Q. How many years did you stay there?
A. Until I was about 15 years.
Q. That is about 13 or 14 years ago?
A. It must be.

Q. Did you go to school there?
A. Yes, sir, I passed the public schools.
Q. Where did you go from this town where you were born?
A. My father sent me to Warsaw and gave me in to learn a trade, gave me money for it.
Q. How long did you remain in Warsaw?
A. Until I was about 20 or 21.
Q. That is about 6 years ago?
A. Yes.
Q. What did you do while you were in Warsaw?
A. Worked for a jeweler.
Q. Making jewelry in a factory?
A. Yes, sir.
Q. Did you follow any other trade there?
A. No, sir.
Q. Are you married or single?
A. I got married there.
Q. Who did you marry?
A. Leah.
Q. What other name?
A. I don't know, they didn't need any other name, it was a time the socialism was going on.
Q. You mean to say that you married a woman and didn't know her other name?
A. No.
Q. Did you know her parents?
A. No, she told me once her father's name was Isaac.
Q. Did you ever know they had any other name?
A. No.
Q. When were you married?
A. About 7 years ago.
Q. In what place?
A. Warsaw.
Q. Who married you?
A. A Rabbi.
Q. What Rabbi?
A. A Jewish Rabbi.
Q. What is his name?
A. Smolevich or something like that.
Q. Was he a fully authoized Rabbi?
A. I don't know, but he wasn't a Government Rabbi.
Q. What kind of a Rabbi was he?
A. A district Rabbi there are lots of Jewish Rabbis in the old country but a Government Rabbi has to be appointed by the State Department.
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Q. Did you get a license to be married?
A. No, sir.
Q. You mean to say in Russia you don't need a license?
A. No, sir.
Q. What sort of a ceremony did you go through with Leah?

A. Chupa-Kadusan. In the Hebrew interpretation it is "marriage ceremony."

Q. Did you stand under a canopy?

A. Yes, sir.

Q. Was anyone present at the ceremony?

A. Sure, couple of friends.

Q. Who were they?

A. I don't remember their names, maybe if I saw them I would remember them.

Q. Did the Rabbi give you any paper after you were married?

A. No.

Q. Did he give Leah a paper?

A. Yes.

Q. Where is that paper now?

A. I don't know, I suppose she has it. She is supposed to keep that.

Q. After you were married where did you go with her?

A. Stayed there in Warsaw.

Q. Did you and she live together?

A. Yes.

Q. How long did you live together?

A. About 5 or 6 months.

Q. Did you have any children?

A. No, sir.

Q. Have you ever had any children by her?

A. No.

Q. Why did you and she separate?

A. Because I heard stories for instance, that she didn't do right and she was going out with some boys when I was to work and I told her to stop that and to be nice woman in the house and then we started fighting and I left her and she told me she never was married before and I found out that she was married before and then I asked her so she said she got a divorce from him but still she ought to tell me this before I married her, and that is the reason I left her and went to the U. S.

Q. That was 7 years ago?

A. Yes, sir.

Q. What month was it?

A. When I got married to her it was about 2 weeks before Jewish Christmas.

Q. Did she have any children then?

A. No.

Q. Did she have any at your house?

A. No, not at my house.

8 Q. As far as you knew, she had none?

A. No.

Q. Were you told that she had had some children?

A. Yes, I heard later on.

Q. You heard afterwards that she had had children before your marriage?

A. Yes.

Q. Did you know to whom she had been married?
A. No.
Q. Did you ever see the man?
A. No.
Q. Ever hear his name?
A. No.
Q. Do you know whether he is now living?
A. No.
Q. Have you ever known a man by the name of Moshe Hochberg?
A. That is the first time I ever heard, it was in the paper.
Q. You saw it in the newspaper?
A. Yes.
Q. After you separated from Leah where did you go?
A. I went to my town and from my town to the U. S.
Q. How many years ago was that?
A. Last Sept. was 6 years ago.
Q. And when you left your native town how did you go to come to the U. S. A.?
A. I went to London and from there I bought ticket to the U. S.
Q. Where did you land in the U. S.?
A. New York.
Q. What was the name of the boat?
A. Stattendam.
Q. What was the date of your landing at New York?
A. 20th of Sept., 1904. A day behind or before I don't know which.
Q. Now when you landed in New York were you examined by the Immigration authorities?
A. Yes, sir.
Q. Who were you going to?
A. I had an address of some friends, a friend from my town.
Q. What was his name?
A. I don't know.
Q. On what street did he live?
A. Essex St.
Q. You were going to that friend?
A. Yes.
Q. Who came with you on the boat, *and* friends of yours?
A. None of my friends.
Q. And after you left Ellis Island, or were examined by the Immigration office, did you go to your friends?
A. No, sir.
Q. Where did you go?
A. The address was wrong and they left me down at Ellis Island and I was short of money and then I got an address from the
9 steamer, a fellow was there and he gave me an address and told me that I should notify his friends there that he was coming and I was over there and notified his friends and left my grip there.
Q. What was this man's name that gave you this address?

A. I don't know.
Q. Who were these people to whom you went and notified?
A. I don't know what their names were, Charles or Challis or something like that.
Q. What did you do after you went to New York?
A. I looked for work.
Q. Where did you work?
A. On Henry St., then I moved from there to Monroe St. and then to Madison St.
Q. Various places in New York?
A. Yes.
Q. What work did you do?
A. Jewelry business, waiter in Krauss & Globerg's.
Q. How long did you work for them?
A. About 6 weeks.
Q. From there where did you go?
A. Wandered around idle about a month then got a job for $5 per week for the New York Neckwear Co.
Q. How long did you work for these people?
A. About 7 months. Then I asked for a raise and they said they could not afford it.
Q. After that where did you work?
A. For a tailor, an operator. A friend of mine told me how to operate and I worked at that for $8 per week and then I worked at that 2 weeks and then there was a strike, unbasted children's jackets, they made.
Q. How long did you continue to live in New York?
A. Until I came here.
Q. When was that?
A. I came here in March, 1910.
Q. That is last March?
A. Yes.
Q. Have you been living here ever since?
A. No, sir, what you mean?
Q. Have you been living here since coming here last March?
A. Yes.
Q. Where?
A. No. 153 Napoleon street, with my relative.
Q. What is his name?
A. Harry Newman.
Q. What have you been doing?
A. Paper hanging and painting.
Q. Have you ever been back to the old country?
A. No, sir.
Q. Since you landed at New York you have continuously resided in the U. S.?
A. Yes, sir.
Q. How many times were you arrested while you lived in New York?
A. Once.
Q. What for?

A. I don't know myself. It was a time when everybody got arrested.

Q. What was the charge that was made against you?

A. I don't know what charge.

Q. Were you tried in court?

A. They put me in court and the judge didn't ask me anything and some fellows said something.

Q. What did they say?

A. I don't know. Said I was walking around there.

Q. Did they fine you?

A. Yes; $10 fine.

Q. Did you pay your fine?

A. Yes, sir.

Q. You were allowed to go then were you?

A. Yes.

Q. Was your picture taken by the police in New York?

A. Yes.

Q. That was about two years ago?

A. Yes.

Q. What was the date of that arrest?

A. I don't know.

COYNE: I wish to introduce at this point, letter from the New York Immigration office, dated Dec. 8, 1910, marked "Exhibit D," and is now made a part of this record. And also a picture of the alien taken by the Police Department at Detroit, Mich., marked "Exhibit B," and now made a part of this record. And enclosed with the letter from New York dated Dec. 1910, is a picture from the Rogue's gallery in New York, which is of the same person as shown by the pictures of the police department. And I also wish to introduce at this point letters which were introduced *on* the case of Bennie Berman, alias Ike Willis, marked "Exhibit B—20 to 28th inclu.," which now constitute a part of this record, by reference to said Bennie Berman, alias Ike Willis case.

GROSSMAN: I have no objections.

COYNE to alien:

Q. Now at this arrest in New York you were accompanied by two men?

A. Yes.

Q. What were they, burglars or crooks?

11 A. No, they came over and asked me if I had a match and just then a policeman come and had all of us arrested.

Q. Are you wanted by the police at any other place?

A. I am wanted no place.

Q. Did you ever see this Leah again since you have come to America?

A. Not until she came here.

Q. And on what occasion did you see her?

A. On the train.

Q. Where?

A. At Windsor. I met her over there.

Q. When was that?
A. 17th of Nov., 1910.
Q. How did you happen to meet her at that time?
A. I was home not working one day and Berman comes up and asks for me and I don't know how he got my address and I was surprised that a strange man should ask for my name but my cousin, Mrs. Newman, told him he should come back at night when I got home from work and he came back and said "I have regards for you" and he said, "Are you Lewis" and I said "yes" and he asked me questions, if I was ever in Warsaw and I said yes, and he said, "I have regards from your wife" and I pretended to say that I haven't got any, because I kept myself single, but still when he mentioned the name I knew what it was and I said, "Where is she, what does she want of me" and he said she is not here, she is in Canada, but I will let you know when she gets here. On the 17th I went to work in the morning and at dinner time when I got back Mr. Berman was there waiting for me. I said, "what is the matter" and he said, "I received a telegram that my wife and your wife are coming here and I want you to come over with me to Windsor and meet them," and I said, "she will come over to the Immigration office they should sent for me over there and she could get out." Well he said it was better for me to come over there, "for you know how a woman is;" he said, "She might make you trouble" and I didn't think about it, so I went there and met her and I went over to Windsor and stood there about 15 or 20 minutes and got a train to the station at Windsor and met her there but very cool and came over here to the Immigration office.
Q. Then what did you do?
A. I got on a train.
Q. Come across the river with her?
A. Yes.
Q. While you were on the train did an Immigration officer question you?
A. Yes.
Q. What did you tell him?
A. That she was my wife.
12 Q. What did you say about yourself?
A. That I just came from Detroit and that I am a Detroit man and always lived there and showed him my first papers.
Q. Did you have your first papers with you then?
A. Yes.
Q. What did he say?
A. He said, "all right, I will let you off" and then the other fellow handed him some other tickets for the baggage, Mr. Berman it was, so he told me and told him, "you can go there alone to the Immigration office," so we went there.
Q. At the Immigration office you took an oath that this woman was your wife, didn't you?
A. Yes.
Q. After you left the Immigration office with Leah where did you go?

A. Went over to the depot, she went and recognized her trunk and then we went right to my home at 153 Napoleon street with her.

Q. And she and you stayed there?

A. No, she didn't stay there, she said the house isn't clean and some things, that is a woman's way, and I said, "all right you can go wherever you want to."

Q. Did she come back the next night?

A. The next morning she came back to see me. I wasn't working the first half day, and I was waiting for her.

Q. You and she stayed in the house all day?

A. Dinner time came and I wanted to open up the trunks and she put up the reason not to break them up now, and my cousin came to get some special work done and I went away to work. That was Friday.

Q. Where did she stop that night?

A. I don't know.

Q. Did you see her the next day?

A. Yes, dinner time.

Q. She was over to you again?

A. Yes.

Q. And where did she stop on the night of the 19th?

A. I don't know; she wasn't with me.

Q. Did you hear that she had been arrested?

A. Yes, Sunday morning.

Q. That was the last you saw her?

A. Yes; Saturday dinner time.

Q. The reason you and she didn't stop together at 153 Napoleon street was because she didn't wish to?

A. Yes.

Q. But you had a room ready for her?

A. Yes. It wasn't quite ready but I was willing to take her in.

Q. When you went over to Windsor and came across the
13 river on the train it was with the intention to take her to your place?

A. To have a house for ourselves and not be single around places all the time.

Q. Now, isn't it a fact that you never knew this woman before, until Berman got you to go over to Windsor to meet her so that she could get in without any trouble, by saying that she was your wife?

A. No.

Q. Have you ever been married since then?

A. No, sir.

Q. Have you ever taken out a divorce?

A. No, sir.

Q. Have you got your first papers with you now?

A. Not with me, I guess Mr. Grossman has them. (Counsel presents original copy, also certified copy of this alien's declaration papers, declaring his intention to become a U. S. citizen, which is introduced as "Exhibit F," and now made a part of this record.

Q. When did you begin to use the name of Lewis?

A. Since after I came over here, as soon as I started working for Krauss & Globerg.

COYNE: Is there any objections to my introducing the same Exhibits as were introduced in the previous hearing?

GROSSMAN: I have no objection to their introduction.

COYNE: I hereby introduce Phila. letter dated Dec. 7th, 1910, marked "Exhibit C" and now made a part of this record. I also wish to introduce here, statement made by this alien before Inspector Coyne at police headquarters, Detroit, Mich., on Nov. 21, 1910, marked "Exhibit E" and now made a part of this record.

COYNE to alien:

Q. You are now under an indictment of the Federal grand jury in Detroit, Mich., on a charge of bringing this alien woman into the United States for an immoral purpose?

GROSSMAN:

A. We admit that he is under an indictment on a charge of bringing an alien woman into the U. S. for an immoral purpose.

COYNE to alien:

Q. Did Leah Lewis tell you when she came here that she had left a man by the name of Moshe Hochberg in London?

A. No, sir.

14 Q. Did Berman tell you so?

A. No, sir.

Q. Since you have been locked up here in the jail hasn't Berman told you that she is the wife of a man by the name of Moshe Hochberg?

A. No, never told me anything.

Q. According to this letter from the Phila. office, you were known to the police of Phila., is that so?

A. No, sir; I never was there.

Q. Did you ever hear that this woman was a shop-lifter?

A. Never heard it until I saw it in the papers, that she was arrested in Detroit.

Q. Where is her father now?

A. He must be in Europe.

Q. Have you heard from him since coming out here?

A. No, sir.

Q. Is your father living?

A. Yes; I got letters some times from him.

Q. What was it, that at the Immigration office you stated that this woman had been living in Detroit, and had simply gone across that day to Canada?

A. She told me that.

Q. That is when you got on the train at Windsor she told you what to say to the Immigration office?

A. Yes.

Q. And you went to the Immigration office and said that?

A. Yes.

Q. And you have said ever since what you were told to tell?
A. No, than I said she had come from Canada and they made me pay $4 head tax for her.
Q. Do you know a woman by the name of Fannie Belmargis?
A. No, sir.
Q. Do you know a man by the name of Max Greenberg?
A. No, sir.
Q. Wasn't Greenberg at No. 153 Napoleon street?
A. No.
Q. Do you know a man by the name of Cuttler?
A. (No answer.)

GROSSMAN: That is objected to as incompetent, immaterial and irrelevant.

ALIEN:

A. No, sir.

COYNE to alien:

Q. Isn't Cuttler a member of a gang of crooks of which you and Berman are also members?
A. I don't know; I am not a crook, you can mix me up with others if you wish to.
15 Q. How long has Berman been here?
A. I don't know. I don't know how long he has been here.
Q. Did you know him in New York?
A. No, sir.
Q. Did you know Cuttler in New York?
A. No, sir; I don't know him now.
Q. Do you mean to say that Cuttler wasn't in that house at No. 153 the night we arrested you?
A. I don't know whether he was or not.
Q. Was Greenberg there at that time?
A. I don't know him at all.
Q. Did you ever communicate with Leah after you left Russia?
A. Very seldom, I wrote to my friends to ask her if she wanted to take a divorce and I got an answer she didn't care about it and I dropped it and didn't write any more.
Q. Did you ever write to her asking her to come out to this country?
A. No.
Q. Did you want her to come out here?
A. No.
Q. Then if you didn't want her to come out here, why did you go to Canada and bring her here?
A. I was afraid she would make me some trouble.
Q. Did you ever send her money towards her support?
A. No.

COYNE to Grossman: Mr. Grossman, you may question alien now, Mr. Grossman.

GROSSMAN to Lewis:

Q. What kind of work did you do when you were in Detroit?
A. Paper hanging and painting.
Q. For what people?
A. Mr. Freidman, he lives on Napoleon and Rivard, Mr. Simons, Cor. Hastings and Alfred; Mr. Knapel, Cor. Hastings and Windser; Mr. D. W. Simons, 328 Majestic Bldg.; Mr. Weingarten, 339 Monroe avenue; Schroeder, Cor. High and Hastings; at the Goldberg restaurant at High and Hastings.
Q. What did you do at Goldberg's?
A. Paper hanging.
Q. Where else?
A. For Mr. Weitsman and Mr. Schmire.
Q. Did you work for J. P. Rosenthal, on Gratiot avenue, Cor. Montcalm and Hastings?
A. Yes.
Q. Did you work for anybody else?
A. In a pool room at Cor. of High and Hastings, at Brascky's place.
Q. For who else?
A. Lester Café, Cor. Hastings and Montcalm.

16 Q. Well, you have been working for all these people around here?
A. Yes.
Q. And were you ever arrested in Detroit except this time?
A. No.
Q. Did you ever know that Leah was a shop-lifter?
A. No.
Q. And when you brought her over here at the time you came over with her, did you want her to do anything wrong?
A. No, sir.
Q. What did you want her to do?
A. To be a nice woman, stay in the house and tend to me when I came from work, like a husband.
Q. Well, are you her husband?
A. Yes.

GROSSMAN: That is all.

COYNE to alien: Did you ever take out your final papers?
A. No, sir.
Q. Never took out your second papers?
A. No, sir.

GROSSMAN to alien:

Q. How old were you when you came to the U. S. A.?
A. About 20 or 21.

COYNE to alien: Have you any personal effects in Detroit, except what is at 153 Napoleon street?
A. No.
Q. Got any money in the banks here?
A. No, sir.

Q. Have you told anyone here, since this case was started that what you have stated here since you came in with this Leah, has not been the truth?

A. No, sir; I told everybody that what I said was the truth. I told Mr. Frick that.

Q. Did you tell any one you wanted to change it?

A. No, sir; what should I change it for.

Q. Did you tell Mr. or Mrs. Newman that what you said was not the truth and that you wanted to change it?

A. No, sir.

GROSSMAN to alien:

Q. How often did you see Mr. Frick here?

A. He was here twice.

Q. Was he here today?

A. Yes.

Q. What did he say to you?

A. He said that I should tell the truth, when I was here in the examination.

Q. What else did he say? Did he say anything about you going free if you told the truth?

A. No, he said to me to say the truth.

17 Q. And you have told the truth here?

A. Yes, sir; I asked him the question, "suppose my wife says something different from what I say, would it be perjury?" and he said he wouldn't prosecute me for perjury.

COYNE to Grossman: Do you wish to introduce further testimony in this case?

A. No, sir; but I wish to introduce some testimony in the shape of deposition or affidavits.

COYNE: Counsel will be given opportunity to file a brief in this case.

Alien was notified of his right to be released from custody by furnishing bail bond in the sum of $5,000, of which right he expressed his inability to avail himself, wherefore he was placed in the custody of the sheriff of Wayne County, at the Wayne County Jail, Detroit, Mich., awaiting the decision of the Secretary in his case.

Exhibits.

A-1. Telegraphic warrant of arrest.
A-2. Department warrant of arrest.
A-3. Telegram raising bail from $1,000 to $5,000.
B—. Photopraph of alien in this case.
C—. Phila. letter dated Dec. 7, 1910.
D—. N. Y. Commissioner's letter dated Dec. 8, 1910.
E—. Statement made by alien on Nov. 21, 1910.
F—. Copy of this alien's declaration of intention to become a U. S. citz.

"EXHIBIT F."

Circuit Court of the United States for the Southern District of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Sam Lewis, of Brownsville, Brooklyn, N. Y., being duly sworn, deposes and says that he was born in Russia, in the year one thousand eight hundred and eighty-two and emigrated to the United States, landing at the port of New York in the State of New York, on or about the 25th day of September, A. D., 1904, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign Prince, Potentate, State or Sovereignty whatever, and particularly to the Emperor of Russia, of whom he is at this time a subject.

18 Sworn to before me this 16th day of May, 1906.

SAM LEWIS.

Clerk's Office, Office of the Circuit Court of the United States for the Southern District of New York.

I Hereby Certify, that the foregoing is a true copy of an Original Declaration of Intention on file and remaining of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said court this 28th day of Nov. 1910.

[SEAL.] (Sgd.) JOHN A. SHIELD, *Clerk.*

EXHIBIT B.

UNITED STATES OF AMERICA:

The District Court of the United States for the Eastern District of Michigan, Southern Division, of the November Term, A. D. 1910.

(Presented in Open Court and Filed December 9th, 1910.)

EASTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

The Grand Jurors of the United States of America, empaneled and sworn to inquire in and for the body of the Southern Division of the Eastern District of Michigan, upon their oaths present: That heretofore, to wit: on the seventeenth day of November, in the year of Our Lord one thousand nine hundred and ten, at the City of Detroit, in the County of Wayne, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this honorable Court, one Samuel Lewis, alias Sam Przysuskier, alias Sam Nossek, late of the City of Detroit aforesaid, did unlawfully,

wilfully and knowingly import and bring into the United States, at Detroit aforesaid, from a foreign country, to wit: the Dominion of Canada, for an immoral purpose, to wit: for illicit concubinage and cohabitation, an alien woman, to wit: one Lena Ochberg, alias Lena Lewis, alias Lije Stawskowski, who was then and there a citizen of Russia and a subject of the Emperor of Russia: Contrary to the Form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

____ ____,
United States Attorney, Eastern District of Michigan.

____ ____,
Ass't U. S. Attorney, Eastern District of Michigan.

19 Sec. 3, Mar. 26, '10.

STATE OF MICHIGAN,
County of Wayne, ss:

Guy W. Moore of Detroit, Wayne County, Michigan, being first duly sworn says: that he has, as attorney for Samuel Lewis whose Petition for Writ of Habeas Corpus is hereto attached, demanded copies of the following warrants,

'Warrant of Arrest'
'Warrant of Deportation' &
'Warrant of Commitment to Wayne County Jail'

from G. Oliver Frick, United States Immigrant Inspector, In Charge, in the matter of the Deportation of said Samuel Lewis, and same were refused.

Affiant further says that copies of said warrants as aforesaid were demanded of the said G. Oliver Frick that same might be attached as Exhibits, and be made a part of the petition of the said Samuel Lewis for the Writ of Habeas Corpus as aforesaid.

GUY W. MOORE.

Subscribed and sworn to before me, This 4th Day of April A. D. 1911.

CHAS. THUMAN,
Notary Public, Wayne County, Michigan.

My Commission expires Sept. 29, 1914.

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

Writ of Habeas Corpus.

(Filed April 15, 1911.)

The President of the United States to the United States Immigrant Inspector in Charge, G. Oliver Frick, Greeting:

We command that you have the body of Samuel Lewis, by you imprisoned and detained, as it is said, together with the time and

cause of such imprisonment and detention, by whatsoever name the said Samuel Lewis shall be called or charged, before the Honorable Arthur C. Denison, United States District Judge, sitting in said District by designation, at the United States District Court Room in the City of Detroit, in said District, on the 14th day of April, A. D., 1911, at ten o'clock A. M., to do and receive what shall then and there be considered concerning the said Samuel Lewis, and have you then and there this writ.

20 Witness, the Honorable Edward D. White, Chief Justice of the United States, and the Seal of said court, this Thirteenth day of April in the year of our Lord one thousand nine hundred and eleven.

[SEAL.] MARTIN J. CAVANAUGH, *Clerk.*
By ELMER W. VOORHEIS,
Deputy Clerk.

EASTERN DISTRICT OF MICHIGAN, *ss.:*

I hereby certify and return that upon the 13th day of April, A. D., 1911, I served the within writ on the within named G. Oliver Frick, United States Immigration Inspector in Charge, at his office in the City of Detroit, in said District, by delivering to him personally, a Certified Copy thereof.

FREDERIC FLORIAN,
Especially Deputized to Serve the Within Writ.

I hereby certify that the within Writ of Habeas Corpus was duly allowed by me on the 13th day of April, A. D. 1911.

ARTHUR C. DENISON,
United States District Judge Sitting by Designation.

Returned served, filed and entered Apr. 15, 1911.

MARTIN J. CAVANAUGH, *Clerk.*

Frederic Florian is hereby specially deputized to serve the within writ.

Apr. 13, 1911.

ARTHUR C. DENISON,
District Judge by Designation.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

In the Matter of the Petition of SAMUEL LEWIS for Writ of Habeas Corpus.

Answer to Petition for Writ of Habeas Corpus.

(Filed April 14, 1911.)

Now comes C. Oliver Frick, respondent in compliance with the citation heretofore served upon him, requiring him to appear and answer the petition of said Samuel Lewis for a writ of habeas corpus,—for answer says:

21 That said Samuel Lewis was on the 24th day of November A. D., 1910, placed under arrest by virtue of a warrant from the Department of Commerce and Labor: that said Samuel Lewis had a full and complete hearing upon said warrant for apprehension, and on the 14th day of February A. D., 1911, the Secretary of Commerce and Lebor made a finding upon the evidence taken in said cause then pending before said Secretary of Commerce and Labor and adjudged that said alien is a member of the excluded classes in that he has been convicted of and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry to the United States; that he procured, imported and brought into the United States a woman for an immoral purpose; that at the time of his entry into the United States he was a person likely to become a public charge; and that he is unlawfully within the United States in that he secured admission by false and misleading statements, thereby entering without the inspection contemplated by law, and issued an order thereon that he, the said Samuel Lewis be deported to the Country from whence he came, to-wit: Russia, and that by virtue of said warrant this respondent holds said Samuel Lewis for the purpose of deportation and further says that the matters and things determined by said Secretary of Commerce and Labor is exclusively within the jurisdiction of said Secretary of Commerce and Labor and are not within the jurisdiction of this Court.

Respondent further says that since the trial of the case in this Court, of the United States against Samuel Lewis, said Samuel Lewis obtained a stay of the execution of said warrant of deportation and submitted such additional evidence to the Secretary of Commerce and Labor as he saw fit, and on the 13th day of April A. D., 1911, the Secretary of Commerce and Labor directed this respondent to, immediately execute said warrant of deportation, therefore this respondent asks that this writ be not granted.

G. OLIVER FRICK,
Inspector in Charge Immigration.

On this 14th day of April A. D., 1911, personally appeared before me, G. Oliver Frick, and made oath that he has heard read the above answer subscribed by him and knows the contents thereof, and that the same is true except the matters therein stated on information and belief and as to those matters he believes it to be true.

[SEAL.] ELMER W. VOORHEIS,
Notary Public, Wayne Co., Mich.

Commission expires April 1, 1914.

22 In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

No. 243.

SAMUEL LEWIS, Petitioner,
vs.
G. OLIVER FRICK, Immigration Inspector, Respondent.

Memorandum of Hearing.

(Filed April 21, 1911.)

April 14, 1911.—Respondent appeared in person, and by F. H. Watson, District Attorney, petitioner with him. Florian, Moore & Wilson counsel for petitioner.

Mr. Frick's answer filed. He produced also, for inspection by the court, his complete copy in the matter, being:

1. Copy of warrant of arrest.
2. Copy warrant of deportation.
3. Copy letter 2-28 from Commissioner at Montreal.
4. Copy telegram 3-23 Frick to Montreal.
5. Copy letter 3-24 Montreal to Frick.
6. Copy telegram 3-24 Montreal to Frick.
7. Copy telegram Secretary to Frick, 4-13.

Thereupon in response to questions from me, Mr. Frick made the various statements and concessions referred to in the opinion this day filed, and it was agreed that, without any formal hearing, the facts might be considered as therein recited.

April 20th, 1911.

ARTHUR C. DENISON,
District Judge, Sitting by Designation.

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

LEWIS, Petitioner,
vs.
FRICK, Immigration Inspector, Respondent.

Opinion.

The petitioner, Samuel Lewis, came from Russia, to this
23 country, entering at the port of New York, and regularly passing inspection, on September 20th, 1904. He lived in, or in the vicinity of New York, until March, 1910, when he came to Detroit, where he has since made his home, and worked as a painter and paper hanger, and it is undisputed that he was industrious and orderly and in no trouble until November 17th, 1910. On that day, he went across the river, from Detroit to Windsor, remained not more than an hour or so, and brought back with him, into the United States, a woman claimed to be his wife. On this occasion, he made to the immigration officers a statement as to the woman and her recent history, some part of which statement was concededly untrue. In December following, he was indicted by the grand jury for violation of §3 of the immigration law, as amended March 26th, 1910, the sole charge being that in bringing this woman across the river on November 17th, she was, by him, imported for an immoral purpose. This indictment duly came on to be tried in the District Court of this district, and on March 23rd, 1911, the trial jury rendered a verdict of not guilty.

On November 24th, 1910, he was arrested by an immigrant inspector upon a warrant of arrest issued by the Department of Commerce and Labor and specifying as its moving causes: (1) that he had been convicted of or admitted having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entering the United States; (2) that he had brought into the United States a woman for immoral purposes; (3) that at the time of his entry (November 17th, 1910), he was likely to become a public charge; and (4) that he entered without inspection and, hence, was unlawfully in the country. Certain hearings and examinations were held before the inspectors. Complaint is made concerning some features of these examinations, and it is said that he did not have a fair hearing or such hearing as the law requires. So far as concerns the main question of fact into which the Department undertook to examine, viz., the importing of the woman, I do not see sufficient ground for these complaints, and if the Department had jurisdiction, under the existing circumstances, to hear and determine this question of fact and to deport upon that ground, I should not undertake to review its conclusion.

What I understand to be a complete file copy of the Department proceedings does not show any formal finding by the Department
upon the charges made, but that is, probably, not material,
24 because, on February 14th, 1911, the Secretary of Commerce and Labor issued his warrant of deportation, reciting that,

after due hearing, he had become satisfied that Lewis, who landed at Detroit, Michigan, from Canada, November 17th, 1910, was in this country in violation of the immigration law as amended March 26th, 1910, in this, to-wit:

"That the said alien was a member of the excluded classes in that he has been convicted of and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the U. S.; that he procured, imported and brought into the U. S., a woman for an immoral purpose; that at the time of his entry into the U. S., he was a person likely to become a public charge; and that he is unlawfully within the U. S. in that he secured admission by false and misleading statements thereby entering without the inspection contemplated by law; and may be deported in accordance therewith."

Thereupon, the warrant directed that he be taken to New York and be from there deported to Russia.

February 28th, the Department directed that his deportation be stayed until he was released by the court authorities in connection with the pending indictment. March 23rd, Mr. Frick was authorized to stay deportation for ten days further to enable Lewis to submit additional information. Lewis, by his attorneys, submitted to the Department, at Washington, a showing that he had been acquitted on the indictment and also some character evidence. April 13th, and it is to be assumed after this additional showing, the Secretary withdrew the stay and directed Mr. Frick to execute the warrant immediately.

Thereupon, a writ of habeas corpus was allowed from the court Mr. Frick, appearing in person and by the United States District Attorney, makes return. The foregoing facts and others to be hereafter mentioned, appear without dispute either from the petition and return or from the statements made by Mr. Frick and the District Attorney in open court upon the hearing.

The immigration inspector insists that this court is without jurisdiction to make the inquiry which will be necessary in order to release the petitioner from custody, while the petitioner insists that the Department was without jurisdiction to issue the warrant.

It is entirely clear that when the petitioner, in such case, is an alien, and when the right to deport him depends upon a question of fact and when there has been a hearing by the Department
25 of that question, such hearing being upon disputed evidence, and the conclusion of the Secretary is based upon some evidence, such conclusion cannot be reviewed by the courts, and if the fact so found does, in law, justify the deportation, it must proceed, however, mistaken the conclusion of the Department may seem to the court to have been. On the other hand, it is equally clear that errors of law, by the Department, may be reviewed by the courts; that an erroneous conclusion of law, made by the Department, cannot be sustained by being mistakenly called a conclusion of fact; that a conclusion of fact based upon no evidence tending to support it is of no force, and the hearing at which no evidence is introduced

is no hearing; and that the secretary's authority for deportation must be found in the statute. (See cases cited in Note 1.)

Except as to the charge as to the woman, all the charges depend upon the theory that Lewis' entry into the United States was on November 17th, 1910. I think this is a wholly mistaken theory, on the undisputed facts. There has been a great diversity of holding under varying circumstances as to the effect of a temporary return to his native country by an alien who had established a domicile in this country. Sometimes it is quite clear that the return therefrom to this country must be considered a new entry, and sometimes whether a new entry might be a question of fact; but I find no case supporting the theory that where an alien has an est-blished residence and occupation in this country which has extended, as in this case, for six years, and where he crosses the border, not into his native country but into another foreign country, and so crosses for a mere temporary purpose, and returns within an hour, particularly at a point like the Detroit-Windsor crossing where hundreds are crossing and recrossing every day,—I find no support for the theory that the return in such case can be considered as the entry to which the immigration laws relate. (See cases cited in Note 2.)

It is conceded that the charge relating to having been convicted of or admitting a felony or other crime or misdemeanor, has no basis whatever, excepting that two or three years before coming to Detroit and after he had been two or three years in this country, Lewis was arrested by the New York police on the charge of house-breaking, that this charge was withdrawn and a charge of disorderly conduct placed against him, and that to this he pleaded guilty (or perhaps was convicted) and paid a fine of ten
26 dollars. It is further said that at about the same time and in Atlantic City, Lewis was convicted as a disorderly person and paid a small fine. It does not appear, however, that this Atlantic City charge was ever brought to Lewis' attention in the Department proceedings. As to the New York City charge, Lewis insisted from the beginning that he was guilty of nothing and did not know what he was arrested for and paid a fine because he was ordered to. In this matter, the Department may suspect that Lewis was guilty of house-breaking or that he was consorting with thieves and burglars, but he has neither admitted nor been convicted of any such thing. Certainly, there is no basis for the idea that disorderly conduct, fined ten dollars, is a "crime or misdemeanor involving moral turpitude;" any more than is the case of carrying concealed weapons, considered by Circuit Judge Ward in ex parte Saraceno, 182 Fed. Rep., 955. Jurisdiction to deport cannot rest on this charge; and this without regard to the date of the offense, which was long after Lewis' actual entry into the United States. The latter consideration alone would end the question.

As to the accusation that at the time of his entry he was likely to become a public charge, it is to be noted, first, that this has to do with his actual entry in 1904, as to which no claim is made and no proof taken; second, that at the time of the Windsor-Detroit crossing, he was able-bodied, industrious and self-supporting and

nobody has suggested the contrary; and, third, that the proposition advanced by the Department as the only one upon which this claim was ever thought to rest is that inasmuch as he was bringing in a woman contrary to law, he was likely to be arrested and convicted and imprisoned and so become a public charge. It therefore appears that this element of his offense is collateral to the other or importing charge and must stand or fall therewith, even if it could otherwise have force.

The final ground recited is that he procured admission by false and misleading statements. It is conceded by the inspector that this relates wholly to the Windsor-Detroit admission of November, 1910, and on this subject, it is to be observed first that this was not the time of his admission to the country; second, that his alleged false and misleading statements related wholly to the woman and had nothing to do with himself or his right to admission; and, third, that if their falsity had been discovered when made, he would, nevertheless, have had a perfect right to return to his domicile in Detroit. This ground of deportation, obviously, can not
27 stand on its own merits and is collateral to the charge of importation.

This leaves for consideration only the last named charge, viz., that relating to the woman. The jury found Lewis not guilty. From my familiarity with the evidence, I can say I think the evidence, as fully developed on the trial, (it being, in a substantial way, the same as the evidence before the Department), justified a strong suspicion that Lewis was guilty, but did not justify a conviction under the rules of criminal law. The case is one where the courts could not review the conclusion of the Department, if the Department has jurisdiction to hear such question at all. However, I am unable to find in the immigration law any authority whatever for deporting an alien because he has imported a woman for immoral purposes. Such importation might be fully proved, or, indeed, might be admitted by the alien, and still the Department would have no jurisdiction to deport. It has such jurisdiction only under § 3, and that exists only in case of conviction.

I am led to this conclusion by study and comparison of Sections 2 and 3. Section 2 excludes from admission into the country a person who attempts to bring in a woman for immoral purposes. In terms, it applies only to excluding one who is attempting to get in, but it has been construed to be effective, by relation, in deporting those who had entered; and I accept that construction. Whether it could, in any event and standing by itself, be a basis for deporting an alien who had established and maintained a domicile in this country for six years, and in a case where the offense had nothing to do with the entry of the person to be deported, it is not necessary in this case to decide.

By § 3, Congress has provided that where the woman imported is an alien and the person importing is an alien, a felony is committed; and that the person who is convicted of this felony may be deported. Under the general rules of statutory construction (Noyes, C. J., in Wong Tun vs. U. S., 181 Fed., 313), the intent seems clear that

out of the general class covered by § 2, Congress has selected a particular class named in § 3 and submitted it to a severe punishment, but, in connection therewith, has limited the right to deport to cases where there is a conviction.

The right to prosecute criminally and the right to deport are inconsistent, as concurrent rights; they cannot both be exercised at the same time; Congress saw the necessity of making the proceedings successive; and it clearly, and probably purposely, made the
28 second step depend on the result of the first step.

The conclusion is inevitable that the deportation warrant is void and that the petitioner should be discharged. An order may be entered accordingly; but the discharge may be stayed for a further period of ten days to enable the District Attorney to perfect an appeal, if desired.

Dated April 20, 1911.

ARTHUR C. DENISON,
United States District Judge,
Sitting by Designation.

Notes.

The following notes cover all pertinent cases found in the Fed. Rep. since Vol. 150. Chinese cases are (generally) not included, because they are sui generis (C. C. A.-3, Rodgers vs. U. S., 152 Fed. 346). All relevant Supreme Court cases are reviewed in the citations:

NOTE. 1.—The jurisdiction of the Federal courts on Habeas Corpus, in cases where the Department of Commerce and Labor has ordered deportation.

A.—Instances Where Jurisdiction Discussed and Sustained.

(1) U. S. vs. Nakishima, 160 Fed., 842. (C. C. A.-9.)

(2) U. S. vs. Watchom, 160 Fed., 1014 (Ward, C. J.).

(3) Ex parte Petterson, 166 Fed., 539 (Purdy, D. J.).

(4) U. S. vs. Williams, 173 Fed., 626 (Hand, D. J.). Because determined by a question of law.

(5) Botis vs. Davies, 173 Fed., 996 (Sanborn, D. J.). See comments on attempt of Department to stand on inapplicable laws (pp. 1001, 1002).

(6) Ex parte Koerner, 176 Fed., 448 (Whitson, D. J.). Question of law involved. Cases reviewed.

(7) Ex parte Sibray, 178 Fed., 144 (Orr, D. J.). Discussion on p. 150.

(8) Davis vs. Manolis, 179 Fed., 818 (C. C. A., 7). Controlling question held to be one of law.

(9) Sprung vs. Morton, 182 Fed., 339 (Waddill, D. J.). Cases reviewed on pp. 333, 335, 339.

B.—Instances Where Jurisdiction Denied.

(1) U. S. vs. Watchorn (re Funaro), 164 Fed., 152 (Ward, C. J.). This decision seems not to consider the point that the secretary had no jurisdiction unless an "admission" was involved. In

so far as it seems to hold the secretary's decision final on a question of law, see Ex parte Saracno and In re Nicola, infra.

29 (2) Ex parte Crawford, 165 Fed., 830 (Adams, D. J.).

(3) Re Tang Tun, 168 Fed., 485 (C. C. A., 9).

(4) U. S. vs. Williams, 175 Fed., 275 (Hand, D. J.).

(5) Edsell vs. Mak, 179 Fed., 292 (C. C. A., 9).

(6) De Bruler vs. Gallo, 184 Fed., 566 (C. C. A., 9).

In all of these cases there was involved what was thought to be an "admission," so giving effect to the finality section, and the controlling question was thought to be one of fact.

C.—Conclusion.

That inferences of law from undisputed facts are to be finally drawn by the courts and not by the Department is clearly shown by the two latest cases from the Second Circuit:

(1) Ex parte Saracno, 182 Fed., 955 (Ward, C. J.). Holding that there is no authority to deport unless the person is a member of one of the statutory classes; and that the decision of the Department is not binding if not based on any evidence. "It is impossible to avoid the conclusion that the real ground for the order is that the immigration authorities think the alien is an undesirable citizen, which is a class not excluded by the immigration law."

(2) In re Nicola, 184 Fed., 322 (C. C. A., 2). The question of citizenship, as one of law on undisputed facts, was considered, and the order of the immigration officer reversed.

NOTE 2.—The Case of An Alien who has a Domicile in the United States, but returns to his Native County, and whose re-entry into the United States is challenged.

A.—Instances Where Admitted:

(1) Rodgers vs. U. S., 152 Fed., 346 (C. C. A., 3). Had resided in U. S. four years, returned to native country four months. Act of 1903 is considered, but upon reasons applicable to Act of 1907.

(2) U. S. vs. Nakishima, 160 Fed., 842 (C. C. A., 9). After two years' residence in U. S., had been in native country two years.

(3) Sprung vs. Morton, 182 Fed., 330 (Waddill, D. J.). Nine month- in native country after several years in U. S. See p. 337 for review of cases.

B.—Instances of Exclusion:

(1) Taylor vs. U. S., 152 Fed., 1 (C. C. A., 2). This case discusses whether the statute covers an alien who is not also an immigrant. It was by a divided court, has been doubted by the 9th C. C. A. (160 Fed., 842), and reversed (on another point) by the Supreme Court (207 U. S., 120).

(2) Re Fonaro, 164 Fed., 152 (Ward, C. J.). In native
30 country for five months, after being in U. S. six years.

(3) Ex parte Crawford, 165 Fed., 830 (Adams, D. J.). Circumstances not stated.

(4) U. S. vs. Hook, 166 Fed., 1007 (Morris, D. J.). A return to native country for four days only.

(5) Ex parte Peterson, 166 Fed., 536 (Purdy, D. J.). Nine months in native country, after five years in U. S.

(6) Loe Shee vs. North, 170 Fed., 566 (C. C. A., 9). This

case holds that the admission continues inchoate until the end of the specified probationary period; it does not relate to a domicile once perfected.

(7) U. S. vs. Villt, 173 Fed., 500 (Holt, D. J.). The result reached depended on the peculiar consideration stated.

(8) Ex parte Hoffman, 179 Fed., 832 (C. C. A., 2). A return to Russia for three months after three years in U. S.

C.—Conclusion:

The rule seems fairly settled in the Second Circuit that the second entry is to be treated as a new original; and in the third and ninth to the contrary. Judge Tayler's opinion in U. S. vs. Aultman, 143 U. S., 922, affirmed in 148 Fed., 1022, indicates that the latter view is the law of this circuit. It concerns a contract laborer, and an older law, but I see no distinction in principle.

It is to be noted also that Lewis is ordered deported to Russia, and his entry from Russia was in 1904. If his crossing of November, 1910, was the unlawful admission, he should have been deported to Canada.

Order.

At a session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the district court room in the City of Detroit, in said district, on Friday the twenty-first day of April in the year of our Lord one thousand nine hundred and eleven.

Present: The Honorable Arthur C. Denison, District Judge sitting by designation.

SAMUEL LEWIS, Petitioner,
vs.
G. OLIVER FRICK, Immigration Inspector in Charge, Respondent.

The above petition having heretofore, on the 14th day of
31 April, A. D. 1911, come on to be heard upon the petition and return of the respondent, and the statements and arguments of the parties or their attorneys specified in the memorandum of hearing filed herein, and having been duly submitted to and considered by the court, and the court being of the opinion that the warrant of deportation issued against the petitioner is void for the reasons stated in the opinion filed;

Ordered, that the petitioner be and is hereby discharged from the custody of the respondent;

Further ordered, that such discharge be stayed and the petitioner continue in the custody of the respondent for ten (10) days, within which time respondent may determine whether to appeal, and that in case appeal is taken that petitioner be admitted to bail pending appeal, pursuant to Rule 34, by bond in the sum of Five Hundred Dollars ($500.00) with surety and in form to be approved by this court.

Order.

At a session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room in the City of Detroit, in said District, on Monday the 1st day of May, in the year of our Lord one thousand nine hundred and eleven.

Present: The Honorable Henry H. Swan, District Judge.

SAMUEL LEWIS, Petitioner,
vs.
G. OLIVER FRICK, Immigration Inspector in Charge, Respondent.

The order heretofore made and entered in this cause on the 21st day of April, A. D. 1911, is hereby continued in force and effect for ten (10) days additional time within which appeal may be taken and bond of petitioner filed.

32 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

SAMUEL LEWIS, Petitioner,
vs.
G. OLIVER FRICK, United States Immigration Inspector in Charge.

Assignment of Errors.

Now comes the above named plaintiff in error, G. Oliver Frick, United States Immigration Inspector in charge, the respondent in the above entitled cause, by Frank H. Watson, United States Attorney, and J. Edward Bland, Assistant U. S. Attorney for the Eastern District of Michigan, as counsel and says that in the records and proceedings in the above entitled cause, there is manifest error in this, to-wit:

1. The court erred in sustaining the petition of said Samuel Lewis for a writ of habeas corpus.

2. The court erred in ordering petitioner, Samuel Lewis discharged from custody.

3. The court erred in holding that said court had jurisdiction to hear and determine the matters and things set forth in said petitioner's petition.

4. The court erred in holding that the Secretary of Commerce and Labor was without jurisdiction to issue his warrant of deportation for the said Samuel Lewis.

5. The court erred in holding that the warrant of deportation issued by the Secretary of Commerce and Labor was void.

6. The court erred in holding that petitioner's entry into the

country, was on the 20th of September, A. D. 1904, and that by his leaving the country for Windsor, Canada, and staying for a brief period on the 17th day of November, A. D. 1910, that his return did not constitute an entry within the meaning of section two of the amendment to the Immigration laws passed and approved March 26th, 1910.

7. The court erred in holding that by section three of said Act, it is necessary before an alien can be deported because of his importing alien women for illegal purposes, that it is necessary that he be first convicted of the criminal offense as provided for in Section three.

33 8. The court erred in holding that Congress has limited the right to deport to cases where a conviction has been had, and for other purposes appearing on the record.

Whereas, by the law of the land the said writ of habeas corpus should have been denied, and appellant prays that the order and judgment may be annulled and held for naught and for such other relief as may seem proper in the premises.

May 5, 1911.

FRANK H. WATSON,
United States Attorney,
Attorney for Respondent.
J. EDWARD BLAND,
Assistant U. S. Attorney, Eastern District of Michigan, Attorney for Respondent.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

SAMUEL LEWIS, Petitioner,
vs.
G. OLIVER FRICK, United States Immigration Inspector in Charge.

Petition.

To Hon. Arthur C. Denison, District Judge, sitting by designation in said Circuit:

G. Oliver Frick, United States Immigration Inspector in Charge, respondent to the petition of Samuel Lewis for writ of habeas corpus, by Frank H. Watson, United States Attorney and J. Edward Bland, Assistant United States Attorney, his attorneys, feeling himself aggrieved by the order and judgment entered by said Judge on the 21st day of April, A. D. 1911, in the above entitled proceedings does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Sixth Circuit, and prays that his appeal be allowed and that a transcript of the proceedings, records and papers upon which said order is made, duly authenticated,

may be sent to the Circuit Court of Appeals for the Sixth Judicial Circuit.

May 5, 1911.

34 FRANK H. WATSON,
United States Attorney, Attorney
For Above-named Respondent.
J. EDWARD BLAND,
Assistant U. S. Attorney, Attorney
For Above-named Respondent.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division.

SAMUEL LEWIS, Petitioner,
vs.
G. OLIVER FRICK, United States Immigration Inspector in Charge.

Order.

On reading the petition of said G. Oliver Frick, the respondent in the above proceedings, filed by his attorneys herein together with the assignment of errors accompanying the same, it is ordered that said appeal be allowed as prayed for by said respondents in said petition for appeal.

May 8, 1911.

ARTHUR C. DENISON,
U. S. District Judge, Sitting by Designation.

Order.

At a session of the Circuit Court of the United States for the Eastern District of Michigan continued and held pursuant to adjournment at the District Court Room in the City of Detroit, in said District, on Wednesday the Twenty-eighth day of June, in the year of our Lord one thousand nine hundred and eleven.

Present: Honorable Arthur C. Denison, District Judge Sitting by Designation.

UNITED STATES OF AMERICA
vs.
SAMUEL LEWIS.

In this cause upon the application of Frank H. Watson, United States Attorney, it is by the court now here ordered that the
35 time to make return to writ of error herein be and the same is hereby extended until July 10th, 1911, and that such extension be and the same is hereby entered nunc pro tunc as of the 7th day of June, 1911, and it is further ordered that if on the 11th day of July, 1911, the return has not been made, thereafter the bond

given by respondent Samuel Lewis shall stand as cancelled and discharged without further order.

36 And afterwards towit on January 9, 1912 an entry was made upon the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

2200.

G. OLIVER FRICK, U. S. Immigration Inspector, etc.,
vs.
SAMUEL LEWIS.

Before Warrington, and Knappen, C. JJ. and Killits, D. J.

This cause is argued in part by Mr. J. Edward Bland for the Appellant and is continued until tomorrow for further argument.

And afterwards towit on January 10, 1912 an entry was made upon the Journal of said Court in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

2200.

G. OLIVER FRICK, U. S. Immigration Inspector, etc.,
vs.
SAMUEL LEWIS.

37 This cause is further argued by Mr. J. Edward Bland for the Appellant and by Mr. H. P. Wilson and Mr. Guy W. Moore for the Appellee and is submitted to the Court.

And afterwards towit on February 13, 1912, a decree was entered in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

2200.

G. OLIVER FRICK, United States Immigration Inspector,
vs.
SAMUEL LEWIS.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Michigan and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be and the same is hereby reversed and the appellee is remanded to the custody of the appellant.

38 And on the same day, towit February 13, 1912, an opinion was filed in said cause which reads and is as follows:

Opinion.

39 United States Circuit Court of Appeals, Sixth Circuit.

No. 2200.

Filed Feb. 13, 1912. Frank O. Loveland, Clerk.

G. OLIVER FRICK, United States Immigration Inspector in Charge, Appellant,
v.
SAMUEL LEWIS, Appellee.

Appeal from the United States Circuit Court for the Eastern District of Michigan, Southern Division.

Submitted January 10, 1912; Decided February 13, 1912.

Before Warrington and Knappen, Circuit Judges, and Killits, District Judge.

This appeal is from a judgment in habeas corpus holding a warrant for deportation to be void. It was agreed in the court below that the facts of the case might be considered as they are stated in the opinion. The opinion shows (189 Fed. 146) that on November 17, 1910, Lewis

"went across the river, from Detroit to Windsor, remained not more than an hour or so, and brought back with him, into the United States, a woman claimed to be his wife. On this occasion, he made to the immigration officers a statement as to the woman and her recent history, some part of which statement was concededly untrue. In December following he was indicted by the grand jury for violation of Section 3 of the immigration law * * * the sole charge being that, in bringing this woman across the river on November 17th, she was, by him, imported for an immoral purpose. This indictment duly came on to be tried in the District Court of this district, and on March 23, 1911, the trial jury rendered a verdict of not guilty. The issue was whether the woman was in fact, or was believed to be, his lawful wife.

40 "On November 24, 1910, he was arrested by an immigrant inspector upon a warrant of arrest issued by the Department of Commerce and Labor, specifying, as its moving causes: (1) that he had been convicted of or admitted having committed a felony or other crime or misdemeanor involving moral turpitude prior to

his entering the United States; (2) that he had brought into the United States a woman for immoral purposes; (3) that at the time of his entry (November 17, 1910), he was likely to become a public charge; and (4) that he entered without inspection, and hence was unlawfully in the country. Certain hearings and examinations were held before the inspectors. * * *

"What I understand to be a complete file copy of the Department proceedings does not show any formal finding by the Department upon the charges made, but that is, probably, not material, because on February 14, 1911, the Secretary of Commerce and Labor issued his warrant of deportation, reciting that, after due hearing, he had become satisfied that Lewis, who landed at Detroit, Michigan, from Canada, November 17, 1910, was in this country in violation of the immigration law as amended March 26, 1910, in this, to-wit:

" 'That the said alien was a member of the excluded classes in that he has been convicted of and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he procured, imported and brought into the United States a woman for an immoral purpose; that at the time of his entry into the United States, he was a person likely to become a public charge; and that he is unlawfully within the United States in that he secured admission by false and misleading statements thereby entering without the inspection contemplated by law; and may be deported in accordance therewith.'

"Thereupon, the warrant directed that he be taken to New York and be from there deported to Russia."

After alluding to a stay directed by the Department pending proceedings under the indictment and also to a further stay for ten days to enable Lewis "to submit additional information" the trial judge said:

"Lewis, by his attorney, submitted to the Department, at Washington, a showing that he had been acquitted on the indictment, and also some character evidence, April 13th, and, it is to be assumed after this additional showing, the Secretary withdrew the stay and directed Mr. Frick (the inspector) to execute the warrant immediately."

41 WARRINGTON, *Circuit Judge* (after stating the facts as above).

The right of deportation was denied on the ground that the Department was without jurisdiction. The controlling reasons for so holding were: (1) that all the charges except the one concerning the woman depended upon the charge that Lewis' entrance into the United States was on November 17, 1910, while the court was of opinion that since his first entrance occurred September 20, 1904, the three years' clause of the Act of Congress began to run at that time and so the period for deportation had expired at the date of the Detroit entrance; (2) that as the act of importing and bringing into the United States a woman for immoral purposes is denounced by the act as a felony, Lewis must be convicted of the felony before he can be deported on that charge.

The court believed that there was no evidence tending to support any of the charges, except the one concerning the woman. Where there is nothing to support a charge, we agree that the Department can not rightfully issue a warrant to deport; for that would be a clear abuse of power. But, where a fair though summary hearing has been given, in ascertaining whether there is or is not any proof tending to sustain a charge involved in a case like this, it is not open to courts to consider either admissibility or weight of proof according to the ordinary rules of evidence (Lee Lung v. Patterson, 186 U. S. 176)—even if it believe the proof was insufficient and the conclusion wrong. The question is whether anything was offered that tends, though slightly, to sustain the charge. United States v. Ju Toy, 198 U. S. 253. As Mr. Justice Holmes said in Chin Yow v. United States, 208 U. S. 13:

"But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing can not be established by proving that the decision was wrong."

It is true that in both of the cases last cited the court was dealing with a question of exclusion of an alien, where by the act in question the decision of the executive officer was made final, but we think the rules there laid down, as well as those in Lee Lung v. Patter-
42 son, supra, are in principle applicable here. (Sec. 25, Act Feb. 20, 1907, 34 Stat. 907; 33 Id. p. 591). We are confirmed in this view by the decision in Bates & Guild Co. v. Payne, 194 U. S. 106, where an order of the Postmaster General was under review on appeal in an equity case and not in a habeas corpus proceeding. Justice Brown said (109):

"The rule upon this subject may be summarized as follows: That where a decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

When we consider the complicated duties devolved upon the Department and the objects sought to be accomplished by their proper discharge, viz., the ascertainment of conditions requiring particular aliens to be deported, we are convinced that it is not open to us to examine, according to technical tests, into the sufficiency of matters regarded by the Secretary of Commerce as proof. Thus interpreting the record, we cannot say that it contains nothing tending to support any of the charges other than the one concerning the woman; and of the latter the court said:

"So far as concerns the main question of fact into which the Department undertook to examine, viz., the importing of the woman, I do not see sufficient ground for these complaints, and if the Department had jurisdiction, under the existing circumstances, to hear

and determine this question of fact and to deport upon that ground, I should not undertake to review its conclusion."

We may now consider the grounds stated, upon which the learned trial judge allowed the writ. Section 2 of the act as amended March 26, 1910 (36 U. S. Stat. L. 263-4), defines certain classes of aliens, who "shall be excluded from admission into the United States." Among these classes are (1) persons likely to become a public charge; (2) persons who have been convicted of, or who admit having committed, a felony or other crime or misdemeanor in-
43 volving moral turpitude (prior, of course, to entry into the United States); (3) "persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose." Section 21 of the act (34 Stat. L. 905) vests power in the Secretary of Commerce and Labor to deport an alien who has been found here "in violation of this act * * * within the period of three years after landing or entry," and return him "to the country whence he came." Section 3 as amended March 26, 1910, provides that "whoever shall, directly or indirectly, import * * * into the United States, any alien for the purpose of prostitution or for any other immoral purpose" is guilty of a felony.

Was the period of three years, mentioned in Section 21, applicable in this case to Lewis' entry into Detroit, or only to his original entry into New York? It must be conceded that there is a diversity of judicial opinions upon the subject of temporary absence of an alien from this country and his re-entry. The difficulty, of course, arises through varying interpretations of acts of Congress; for the question is one of legislative intent. The power of Congress to prohibit a second or later entrance of aliens and the power originally to exclude them, are derived from the same source, and are but "parts of one and the same power." Fong Yue Ting v. United States, 149 U. S. 713. Illustrations of the exercise of the power to prevent and to permit re-entry may be found in the Chinese Exclusion case, 130 U. S. 603-4, and Lau Ow Bew v. United States, 144 U. S. 47; the first being based upon an act disclosing an intent to forbid return and the other upon an act showing a purpose to permit return.

One contention is that Lewis had been a domiciled resident here for more than three years prior to his entrance into Detroit, and that this entitled him temporarily to leave the country and re-enter without regard to the provisions defining the excluded classes. True, he had in May, 1906, declared his intention to become a citizen of the United States; but he was still an alien at the time of his re-entry. City of Minneapolis v. Reum, 56 Fed. 556 (C. C. A. 8th Cir.); In re Kleibs, 128 Fed. 656; In re Moses, 83 Fed. 995; Maloy v. Duden, 25 Fed. 673; Wallenborg v. Missouri Pac. Ry. Co., 159 Fed. 217, and In re Polson, ibid., 283.

44 In Lem Moon Sing v. United States, 158 U. S. 538, when speaking of the re-entry of a domiciled alien, Justice Harlan said (547):

"Is a statute passed in execution of that power (to exclude aliens)

any less applicable to an alien, who has acquired a commercial domicile within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to re-enter it? We think not. The words of the statute are broad and include 'every case' of an alien, at least every Chinese alien, who, at the time of its passage, is out of this country, no matter for what reason, and seeks to come back. He is none the less an alien because of his having a commercial domicile in this country."

It is true that the decision was limited to the question whether appellant had been constitutionally committed to officers of the executive department for final determination (550), but the judgment below denying an application for a writ of habeas corpus was affirmed; and we regard the decision as applicable alike to the questions respecting domicile, and legislative intent touching the present use of the word "alien."

Now as to the Windsor-Detroit entry, it is safe to say that according to the present trend of decision of the Federal Courts of Appeals the entry was within the purview of Section two of the amended act. See Ex parte Hoffman, 179 Fed. 839 (C. C. A. 2d Cir.), which was based on the earlier decision of the same court in Taylor v. United States, 152 Fed. 1, 4. In our opinion it was not meant by the reversal of the Taylor case to change the conclusion there reached in the majority opinion as to aliens re-entering this country with apparent intent to remain, 207 U. S. 120; Sibray v. United States, 185 Fed. 401, 402 (C. C. A. 3d Cir.); United States v. Sprung, 187 Fed. 903, 905, 906 (C. C. A. 4th Cir.); Prentis v. Petros Stathakos, decided April, 1911 (C. C. A. 7th Cir.), not yet reported. The decisions in Redfern v. Halpert, 186 Fed. 150 (C. C. A. 5th Cir.), and United States v. Nakashima, 160 Fed. 842 (C. C. A. 9th Cir.), are to the contrary.

The decision of this court in United States v. Aultman Co., 148 Fed. 1022, affirming the judgment of the court below, 143 Fed. 922, is not applicable. That was a prosecution for alleged violation of the law, which forbade and denounced with penalties any encouragement, through solicitation, promise or agreement, of the importation or immigration of aliens for the purpose of performing labor in this country. No question of deportation was involved. The marked difference to be observed between that case and this is, that there the action was against the company to recover the penalty inflicted for inducing an alien to come here; while this is a proceeding to deport an alien. The statute there considered disclosed an intent to protect American labor against foreign pauper labor, and the act of the Aultman Company was regarded under all the circumstances as not falling within the intention of the law. We think it plain that the learned judges taking part in the case—the judge deciding it below and the judge affirming it alone upon his opinion—could not have thought it necessary even to consider the question with which we are now concerned. (See United States v. Williams, 183 Fed. 905.)

In view of the changes made in the statutes and the ends sought to be accomplished under them—which, for example, are so clearly and cogently stated by Judge Lacombe in Taylor v. United States and Ex parte Hoffman—we are constrained to believe that those decisions and their class, when applied to the present statute, more certainly and completely effectuate the intention of Congress than the two opposing decisions do. The power and duty vested in the Department to exclude and to deport objectionable aliens are in their nature continuing. The only limitation stated is that deportation shall take place within three years. This is plainly meant to enable the officials to determine the fitness of aliens admitted. Aliens of fitness may, however, leave the country and return later in a condition and under circumstances that would obviously present the very evils which the act was passed to remedy. Such new conditions and new entry as clearly fall within the letter and purpose of the enactment as the same conditions and an original entry admittedly do.

It is true that to apply to the present case the rule laid down in the majority decisions is, as respects the time of Lewis' absence, to subject the rule to a severe test. Lewis was in Windsor only about an hour; but unless we decline to recognize the charges contained in the warrant of deportation, we must hold that when Lewis
46 re-entered Detroit, he was engaged in the execution of a scheme that was plainly violative of the alien act. He was not returning from the discharge of a temporary and lawful errand; and, having no such question as that before us, we do not pass upon it. If we yield then to the mere duration of Lewis' absence, we must grant to that feature greater importance than we do to the conditions attending his re-entry and to the intention of the law itself.

It is to be observed that under Section 21 the Secretary's power to deport is in terms vested when he is satisfied that an alien is here "in violation of this act." It needs only to be stated that if we are right in believing (upon the charges) that Section 2 is applicable, Lewis' re-entry and his remaining here were "in violation of this act." Haw Moy v. North, 183 Fed. 91 (C. C. A. 9th Cir.); Ex parte Avakain, 188 Fed. 690, s. c. ibid, 694; Williams v. United States, 186 Fed. 479, 481 (C. C. A. 2d Cir.). See also the Japanese Immigrant Case, 189 U. S. 86, 99; Turner v. Williams, 194 U. S. 281, 290.

It remains to consider whether the power to deport under Secs. 2 and 21 just passed upon, is affetced by anything contained in Sec. 3. The case (Wong You v. United States, 181 Fed. 313), relied on in the court below in connection with the holding that a conviction of Lewis under Sec. 3 was a condition precedent to the right to deport him, was reversed by the Supreme Court, January 22, 1912. After stating in the decision of reversal that the court below had "made a mistaken use of its principles of interpretation," the Supreme Court decided that where provision is made in each of two acts of Congress for excluding aliens, the right to exclude may be exercised under the later act. Aside from the rule of re-entry before considered, we regard this as decisive of the existence of the

power to deport under Secs. 2 and 21, irrespective of Sec. 3; for the rule of that decision is clearly equivalent to holding that the provisions of either act there considered might have been resorted to for the purpose of exclusion, and so clears the way to inquire into the real scope and effect of Sec. 3.

We are convinced that the right to deport in this case may be found also in Sec. 3 in connection with Sec. 21, without regard to conviction or acquittal under Sec. 3 alone. Obviously no difference in principle can arise from the fact that two courses are open in the same act, instead of being found in two acts.

47 Besides, Sec. 2 in terms is limited to aliens and Sec. 3 is not. For example, the first clause of Sec. 3 by general language forbids "importation" of any alien for the purpose of prostitution or other immoral purpose; and the next clause—the one corresponding to a clause of Sec. 2—provides that "whoever shall * * * import or attempt to import * * * any alien for the purpose of prostitution or for any other immoral purpose," may be punished. Clearly a citizen as well as an alien is embraced within this language. This is fortified by a later clause of the section; for while the forbidden acts are denounced and punished as felonies, yet the distinction between citizen and alien is consistently carried out in the last clause, which provides that "any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence" be deported. It follows, we think, that the fact that two corresponding clauses are found in Secs. 2 and 3 plainly signifies an intent (in connection with Sec. 21), to create and maintain two distinct remedies under which the right to deport may be exercised.

The judgment of acquittal of Lewis under the indictment returned is not res adjudicata of the present proceeding. Williams v. United States, 186 Fed., 479, 481, (C. C. A., 2d Cir.). Alluding to the charge relating to the woman, the learned trial judge said:

"The jury found Lewis not guilty. From my familiarity with the evidence, I can say I think the evidence, as fully developed on the trial (it being, in a substantial way, the same as the evidence before the Department) justified a strong suspicion that Lewis was guilty, but did not justify a conviction under the rules of criminal law. The case is one where the courts could not review the conclusion of the Department, if the Department has jurisdiction to hear such question at all."

It results that the right to deport in virtue of Sec. 21 is also applicable under Sec. 3. For one of the charges made by the Secretary of Commerce and found to be true in the warrant to deport is, that Lewis "imported and brought into the United States a woman for an immoral purpose;" and this is expressly "forbidden" by the first clause of Sec. 3.

48 Turning to the warrant to deport, it states that Lewis shall be returned to Russia, not to Canada. Secs. 20 and 21 each provide for return "to the country whence he came." In United States v. Redfern, 186 Fed., 603, 604, a native of Spain, who was then a citizen of the Republic of Panama, was held under a warrant ordering his deportation to Spain. It was decided that the Secre-

tary had "no discretion whatever in the matter, and any warrant that attempts to exercise such discretion is necessarily illegal and void," and the writ of habeas corpus was made absolute for that reason. In United States v. Williams, 187 Fed., 470, 471, a person who came to this country from Holland was arrested on his return from Canada and held under a warrant to deport him to Austria, and the writ was dismissed on the ground that the detention was legal and the court had no jurisdiction to direct the Secretary to send him to Canada. We are thus required to ascertain the statutory intent of the words "returned to the country whence he came." Under Sec. 3 an alien whose sentence has expired may be "returned to the country whence he came, or of which he is a subject or a citizen." This is the latest expression of the legislative intent in this regard. Sec. 3 also provides for the deportation of another class of aliens "in the manner provided by sections 20 and 21 of this act." It is difficult to perceive the reason for this difference in language, unless it was the intention of Congress to invest the Secretary in all cases with the discretion given to him by Sec. 3; for aliens subject to deportation may frequently have come here from a country other than the one of their nativity or citizenship, no matter into what clause of the act their cases may fall. Without considering this, however, we think the history of the words contained in sections 20 and 21—as respects their relations to the other portions of the original act and the amendments thereto—shows that the words "returned to the country whence he came" were intended to refer to the place of nativity or citizenship. In the absence of provision or change of provision clearly indicating a different intent, it hardly can be said that it was the legislative purpose otherwise to deport objectionable aliens. This meaning should be ascribed to the words now.

The judgment of the court below must be reversed, and appellee remanded to the custody of appellant.

49 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of G. Oliver Frick, United States Immigration Inspector vs. Samuel Lewis, No. 2200, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 9th day of March, A. D. 1912.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit,
By ARTHUR B. MUSSMAN,
Deputy Clerk.

50 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which G. Oliver Freck, United States Immigration Inspector in charge, is appellant, and Samuel Lewis is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Eastern District of Michigan, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed
51 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 10th day of April, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals For the Sixth Circuit, *ss:*

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 19th day of April, 1912, there was filed in my office a stipulation in the above entitled case in the following words towit:

"Supreme Court of the United States, October Term, 1911.

No. 1010.

SAMUEL LEWIS, Petitioner,
vs.
G. OLIVER FRICK, U. S. Immigration Inspector in Charge.

Stipulation as to Return.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record and

proceedings in the Circuit Court of Appeals for the Ninth [sic] Circuit, now on file in the Supreme Court of the United States, may be taken as the return of the Clerk of the Circuit Court of Appeals to the writ of certiorari issued herein.

PHILIP T. VAN ZILE,
Counsel for the Petitioner.
F. W. LEHMAN,
Solicitor General.

April 15, 1912.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness my official seal and signature and the seal of the United States Circuit Court of Appeals at the city of Cincinnati in said Circuit this 19th day of April, 1912.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

52 [Endorsed:] File No. 23,086. Supreme Court of the United States, No. 1010, October Term, 1911. Samuel Lewis vs. G. Oliver Frick, U. S. Immigration Inspector. Writ of Certiorari. No. 2200. Filed Apr. 17, 1912. Frank O. Loveland, Clerk.

53 [Endorsed:] File No. 23,086. Supreme Court U. S. October Term, 1911. Term No. 1010. Samuel Lewis vs. G. Oliver Frick, U. S. Immigration Inspector. Writ of certiorari and return. Filed April 22, 1912.

208

Supreme Court of the United States

[illegible] TERM, 1911.

No. [illegible]

SAMUEL LEWIS,
Petitioner,
vs.
G. OLIVER PHUE, United States Immigration Inspector, in Charge,
Respondent.

[illegible] Supreme Court, U. S.
[illegible]

MAR 18 1912

JAMES H. McKENNEY,
CLERK

Petition for Writ of Certiorari from the Supreme Court of the United States to the United States Circuit Court of Appeals, Sixth Circuit.

PHILIP T. VAN ZILE, Counsel.

FREDERIC A. FLORIAN,
GUY W. MOORE,
H. P. WILSON,
Attorneys and of Counsel for Petitioner.

DETROIT:
[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

SAMUEL LEWIS,
Petitioner,
vs.
G. OLIVER FRICK, United States Immigration Inspector, in Charge,
Respondent.

Petition for Writ of Certiorari, requiring the Circuit Court of Appeals for the Sixth Circuit to certify to the Supreme Court for its review and determination the case of Samuel Lewis, appellant, vs. G. Oliver Frick, United States Immigrant Inspector, in Charge, respondent.

The petition of Samuel Lewis respectfully shows to this Honorable Court as follows:

First. Your petitioner is a person of Jewish ancestry and a natural born subject of the Czar of Russia; but is now, and since September 20, A. D. 1904, has been, a resident of the United States of America and of no other country, having his domicile in the City of New York in the State of New York, and in the City of Detroit in the State of Michigan, where his domicile now is; and during all that time he has been engaged in lawful employment and has been self-supporting and law-abiding. He entered the United States at the port of New York in the State of New York on, to-wit, the said 20th day of September, A. D. 1904, then and there regularly passing immigration inspection.

Second. Your petitioner on the 16th day of May, 1906, declared his intention to become a citizen of the United States, as appears in the record as filed in this case in Circuit Court of Appeals, Sixth Circuit.

Third. Your petitioner, on the 17th day of November, A. D. 1910, and after a continuous residence of more than six years in the United States crossed the Detroit River at Detroit, Michigan, to Windsor, On-

tario, in the Dominion of Canada, with the intention of returning as soon as possible, and did re-cross the river and return to the United States on the afternoon of the same day, November 17, 1910, after less than one hour's absence from the United States.

Fourth. Your petitioner, on re-crossing the Detroit River and returning to the United States, on November 17, 1910, was subjected to an examination by the United States immigration inspector in charge at Detroit, Michigan, and was permitted to re-enter the country and return to his established domicile in the said City of Detroit, in the State of Michigan; but the said United States immigration inspector in charge at the Detroit port, after having allowed your petitioner to return to his established domicile as aforesaid, on to-wit the 24th day of November, 1910, caused your petitioner to be arrested upon a department (telegraphic) warrant of arrest issued out of the Department of Commerce and Labor of the United States, dated November 23, 1910, charging that your petitioner is an alien; that he entered the United States on November 17, 1910, at the port of Detroit, Michigan, via the Grand Trunk Railroad; that he has been convicted of, or admits having committed, a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he procured, imported or brought into the United States a prostitute, or woman, or girl for the purpose of prostitution or other immoral purposes; that at the time of his entry into the United States he was a person likely to become a public charge; that he is unlawfully within the United States; and that he entered without the inspection contemplated by law.

Fifth. Your petitioner further shows unto this Honorable Court that, in December following, he was indicted by the grand jury for violation of Section 3 of the immigration law as amended March 26, 1910, the sole charge being that on November 17, 1910, he imported into the country a woman for an immoral purpose, which said indictment duly came on to be tried in the District Court of the United States for the Eastern District of Michigan, Southern Division, March 23, 1911, and the trial jury rendered a verdict of not guilty; that thereafter, on to-wit the 13thday of April, A. D. 1911, your petitioner filed a petition in the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, for a writ of habeas corpus to obtain his discharge from detention, alleging, inter-alia,

that he was a lawful resident of the United States, having continuously maintained a domicile in the United States since his entry at the port of New York in the State of New York, on to-wit September 20, 1904, when he was then and there examined and admitted by the United States immigration inspector at that port; that the said acting Secretary of the Department of Commerce and Labor was without authority to make and enforce the order and warrant for deportation for the reason that your petitioner is a lawful resident of the United States, and as such not subject to the surveillance and control of the immigration inspectors or the Department of Commerce and Labor; that your petitioner's detention and imprisonment under said warrant of deportation is against public policy and contrary to the laws of the United States guaranteeing to all lawful residents thereof the right, privilege and benefits properly appertaining and accruing to petitioner under the Constitution and the laws of the land, and that your petitioner has not been committed and is not detained by virtue of any judgment, decree or process issued by a tribunal of competent jurisdiction upon which to base an order or warrant of deportation; that the Department of Commerce and Labor and the acting secretary thereof were without jurisdiction to hear and determine your petitioner's rights in the premises, and that the sole and exclusive jurisdiction thereof was in a justice, judge or commissioner of the United States courts.

The writ was issued directed to G. Oliver Frick, United States immigrant inspector in charge, who produced the body of your petitioner before the said court on the 14th day of April, A. D. 1911, and made answer to the petition for the writ alleging that your petitioner was on the 24th day of November, A. D. 1910, placed under arrest by virtue of warrant of the Department of Commerce and Labor; that your petitioner had full and complete hearing upon said warrant for apprehension, and on the 14th day of February, A. D. 1911, the Secretary of Commerce and Labor made a finding upon the evidence taken in said cause and pending before said Secretary of Commerce and Labor, and adjudged that your petitioner is a member of the excluded classes, in that he has been convicted of or admitted having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he procured, imported and brought into the United States a woman for an immoral purpose;

that at the time of his entry into the United States he was a person likely to become a public charge, and that he is unlawfully within the United States, in that he secured admission by false and misleading statements, thereby entering without the inspection contemplated by law, and issued an order thereon that your petitioner be deported to the country from whence he came, to-wit, Russia; that by virtue of said warrant respondent held your petitioner for the purpose of deportation, and that the matter was within the exclusive jurisdiction of said Secretary of Commerce and Labor and not within the jurisdiction of the Court. The said cause was and is entitled and numbered in the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, "Samuel Lewis vs. G. Oliver Frick, Immigration Inspector, Respondent, No. 243."

Sixth. The case was heard and determined by the said Circuit Court upon undisputed facts appearing in petition and return as herein before recited, which said facts were commented on and incorporated in "Opinion of the Learned District Judge," as appearing in the Record in said case in the Circuit Court of Appeals, Sixth Circuit.

Seventh. Such proceedings were had in the said cause in the said Circuit Court of the United States, that on the 20th day of April, A. D. 1911, the said court rendered a judgment therein as follows:

OPINION.

"In the
CIRCUIT COURT OF THE UNITED STATES
For the Eastern District of Michigan,
Southern Division.

Lewis,
Petitioner,
vs.
Frick,
Immigration Inspector, *Respondent.*

"The petitioner, Samuel Lewis, came from Russia to this country, entering at the port of New York, and regularly passing inspection on September 20th, 1904. He lived in, or in the vicinity of, New York, until March, 1910, when he came to Detroit, where he has since made his home, and worked as a painter and paperhanger, and

it is undisputed that he was industrious and orderly and in no trouble until November 17th, 1910. On that day he went across the river from Detroit to Windsor, remaining not more than an hour or so, and brought back with him, into the United States, a woman claimed to be his wife. On this occasion he made to the immigration officers a statement as to the woman and her recent history, some part of which statement was concededly untrue. In December following, he was indicted by the grand jury for violation of Section 3 of the Immigration law, as amended March 26th, 1910, the sole charge being that in bringing this woman across the river on November 17th, she was, by him, imported for an immoral purpose. This indictment duly came on to be tried in the District Court of this district, and on March 23rd, 1911, the trial jury rendered a verdict of not guilty.

"On November 24th, 1910, he was arrested by an immigration inspector upon a warrant of arrest issued by the Department of Commerce and Labor, and specifying, as its moving causes: (1) That he had been convicted of or admitted having committed a felony or other crime of misdemeanor involving moral turpitude prior to his entering the United States; (2) that he had brought into the United States a woman for immoral purposes; (3) that at the time of his entry (November 17th, 1910), he was likely to become a public charge; and (4) that he entered without inspection, and, hence, was unlawfully in the country. Certain hearings and examinations were held before the inspectors. Complaint is made concerning some features of these examinations, and it is said that he did not have a fair hearing or such hearing as the law requires. So far as concerns the main question of fact into which the Department undertook to examine, viz., the importing of the woman, I do not see sufficient ground for these complaints, and if the Department had jurisdiction, under the existing circumstances, to hear and determine this question of fact and to deport upon that ground, I should not undertake to review its conclusion.

"What I understand to be a complete file copy of the Department proceedings does not show any formal finding by the Department upon the charges made, but that is, probably, not material, because on February 14th, 1911, the Secretary of Commerce and Labor issued his warrant of deportation, reciting that, after due hearing, he had become satisfied that Lewis, who landed at Detroit, Michigan, from Canada, November 17th, 1910, was

in this country in violation of the Immigration law as amended March 26th, 1910, in this, to-wit:

"That the said alien was a member of the excluded classes in that he has been convicted of and admits having committed a felony or other crime or misdemeanor, involving moral turpitude prior to his entry into the United States; that he procured, imported and brought into the United States a woman for an immoral purpose; that at the time of his entry into the United States he was a person likely to become a public charge; and that he is unlawfully within the United States in that he secured admission by false and misleading statements thereby entering without the inspection contemplated by law; and may be deported in accordance therewith.

"Thereupon, the warrant directed that he be taken to New York and be from there deported to Russia.

"February 28th, the Department directed that his deportation be stayed until he was released by the court authorities in connection with the pending indictment. March 23rd, Mr. Frick was authorized to stay deportation for ten days further to enable Lewis to submit additional information. Lewis, by his attorneys, submitted to the Department, at Washington, a showing that he had been acquitted on the indictment and also some character evidence. April 13th, and it is to be assumed after this additional showing, the secretary withdrew the stay and directed Mr. Frick to execute the warrant immediately.

"Thereupon, a writ of habeas corpus was allowed from this court, Mr. Frick appearing in person, and by the United States District Attorney, makes return. The foregoing facts and others to be hereafter mentioned, appear without dispute either from the petition and return or from the statements made by Mr. Frick and the District Attorney in open court upon the hearing.

"The immigration inspector insists that this court is without jurisdiction to make the inquiry which will be necessary in order to release the petitioner from custody, while the petitioner insists that the Department was without jurisdiction to issue the warrant.

"It is entirely clear that when the petitioner, in such case, is an alien, and when the right to deport him depends upon a question of fact and when there has been a hearing by the Department of that question, such hearing being upon disputed evidence, and the conclusion of the Secretary is based upon some evidence, such conclusion cannot be reviewed by the courts, and if the fact so

found does, in law, justify the deportation, it must proceed, however mistaken the conclusion of the Department may seem to the court to have been. On the other hand, it is equally clear that errors of law, by the Department, may be reviewed by the courts; that an erroneous conclusion of law, made by the Department, cannot be sustained by being mistakenly called a conclusion of fact; that a conclusion of fact based upon no evidence tending to support it is of no force, and the hearing at which no evidence is introduced is no hearing; and that the Secretary's authority for deportation must be found in the statute.

"Except as to the charge as to the woman, all the charges depend upon the theory that Lewis' entry into the United States was on November 17th, 1910. I think this is a wholly mistaken theory, on the undisputed facts. There has been a great diversity of holding under varying circumstances, as to the effect of a temporary return to his native country by an alien who had established a domicile in this country. Sometimes it is quite clear that the return therefrom to this country must be considered a new entry, and sometimes whether a new entry might be a question of fact; but I find no case supporting the theory that where an alien has an established residence and occupation in this country which has extended, as in this case, for six years, and where he crosses the border, not into his native country, but into another foreign country, and so crosses for a mere temporary purpose, and returns within an hour, particularly at a point like the Detroit-Windsor crossing, where hundreds are crossing and re-crossing every day, I find no support for the theory that the return in such case can be considered as the entry to which the immigration laws relate.

"It is conceded that the charge relating to have been convicted of or admitting a felony or other crime or misdemeanor, has no basis whatever, excepting that two or three years before coming to Detroit and after he had been two or three years in this country, Lewis was arrested by the New York police on the charge of house breaking, that this charge was withdrawn and a charge of disorderly conduct placed against him, and that to this he pleaded guilty (or perhaps was convicted) and paid a fine of ten dollars. It is further said, that at about the same time and in Atlantic City, Lewis was convicted as a disorderly person and paid a small fine. It does not appear, however, that this Atlantic City charge

was ever brought to Lewis' attention in the Department proceedings. As to the New York City charge, Lewis insisted from the beginning that he was guilty of nothing and did not know what he was arrested for and paid a fine because he was ordered to. In this matter, the Department may suspect that Lewis was guilty of housebreaking or that he was consorting with thieves and burglars, but he has neither admitted nor been convicted of any such thing. Certainly there is no basis for the idea that disorderly conduct, fined ten dollars, is a 'crime or misdemeanor involving moral turpitude;' any more than is the case of carrying concealed weapons, considered by Circuit Judge Ward in ex parte Saraceno, 182 Fed. Rep., 955. Jurisdiction to deport cannot rest on this charge; and this without regard to the date of the offense, which was long after Lewis' actual entry into the United States. The latter consideration alone would end the question.

"As to the accusation that at the time of his entry he was likely to become a public charge, it is to be noted, first, that this has to do with his actual entry in 1904, as to which no claim is made and no proof taken; second, that at the time of the Windsor-Detroit crossing, he was ablebodied, industrious and self-supporting and nobody has suggested the contrary; and, third, that the proposition advanced by the Department as the only one upon which this claim was ever thought to rest is that inasmuch as he was bringing in a woman contrary to law, he was likely to be arrested and convicted and imprisoned and so become a public charge. It therefore appears that this element of his offense is collateral to the other or importing charge and must stand or fall therewith, even if it could otherwise have force.

"The final ground recited is that he procured admission by false and misleading statements. It is conceded by the inspector that this relates wholly to the Windsor-Detroit admision of November, 1910, and on this subject, it is to be observed, first, that this was not the time of his admission to the country; second, that his alleged false and misleading statements related wholly to the woman and had nothing to do with himself or his right to admission; and, third, that if their falsity had been discovered when made, he would, nevertheless, have had a perfect right to return to his domicile in Detroit. This ground of deportation, obviously, cannot stand on its own merits and is collateral to the charge of importation.

"This leaves for consideration only the last named

charge, viz., that relating to the woman. The jury found Lewis not guilty. From my familiarity with the evidence, I can say, I think the evidence, as fully developed on the trial, (it being, in a substantial way, the same as the evidence before the Department), justified a strong suspicion that Lewis was guilty, but did not justify a conviction under the rules of criminal law. The case is one where the courts could not review the conclusion of the Department, if the Department has jurisdiction to hear such question at all. However, I am unable to find in the Immigration law any authority whatever for deporting an alien because he has imported a woman for immoral purposes. Such importation might be fully proved, or, indeed, might be admitted by the alien, and still the Department would have no jurisdiction to deport. It has such jurisdiction only under Section 3, and that exists only in case of conviction.

"I am led to this conclusion by study and comparison of Sections 2 and 3. Section 2 excludes from admission into the country a person who attempts to bring in a woman for immoral purposes. In terms, it applies only to excluding one who is attempting to get in, but it has been construed to be effective, by relation, in deporting those who had entered; and I accept that construction. Whether it could, in any event and standing by itself, be a basis for deporting an alien who had established and maintained a domicile in this country for six years, and in a case where the offense had nothing to do with the entry of the person to be deported, it is not necessary in this case to decide.

"By Section 3, Congress has provided that where the woman imported is an alien and the person importing is an alien, a felony is committed; and that the person who is convicted of this felony may be deported. Under the general rules of statutory construction (Noyes, C. J., in Wong Tun vs. U. S., 181 Fed., 313), the intent seems clear that out of the general class covered by Section 2, Congress has selected a particular class named in Section 3, and submitted it to a severe punishment, but, in connection therewith, has limited the right to deport to cases where there is a conviction.

"The right to prosecute criminally and the right to deport are inconsistent, as concurrent rights; they cannot both be exercised at the same time; Congress saw the necessity of making the proceedings successive; and it clearly, and probably purposely, made the second step depend on the result of the first step.

"The conclusion is inevitable that the deportation warrant is void and that the petitioner should be discharged. An order may be entered accordingly; but the discharge may be stayed for a further period of ten days to enable the District Attorney to perfect an appeal, if desired.

"Dated April 20, 1911.

ARTHUR C. DENISON,
United States District Judge.
Sitting by Designation."

Eighth. The said case of your petitioner in the said Circuit Court of the United States, was heard before and decided by the Honorable Arthur C. Denison, United States District Judge, sitting in the said court by designation and the opinion of the court was delivered by him.

Ninth. Your petitioner further shows that on the 8th day of May, 1911, there was duly allowed by the said Circuit Court on appeal from its said judgment to the United States Circuit Court of Appeals for the Sixth Circuit and a transcript of the record and all proceedings was transmitted to the said United States Circuit Court of Appeals.

Tenth. That on the thirteenth day of July, A. D. 1911, a certified transcript of the record and of all proceedings of the said Circuit Court in the said case was filed in the United States Circuit Court of Appeals for the Sixth Circuit and said case was entered and docketed in the said Court of Appeals and entitled G. Oliver Frick, United States Immigrant Inspector, in charge, vs. Samuel Lewis, appellee, No. 2200, the assignment of errors filed on behalf of appellee were as follows:

1. The court erred in sustaining the petition of said Samuel Lewis for a writ of habeas corpus.

2. The court erred in ordering petitioner, Samuel Lewis, discharged from custody.

3. The court erred in holding that said court had jurisdiction to hear and determine the matters and things set forth in said petitioner's petition.

4. The court erred in holding that the Secretary of Commerce and Labor was without jurisdiction to issue his warrant of deportation for the said Samuel Lewis.

5. The court erred in holding that the warrant of deportation issued by the Secretary of Commerce and Labor was void.

6. The court erred in holding that petitioner's entry into the country was on the 20th day of September, A. D.

1904, and that by his leaving the country for Windsor, Canada, and staying for a brief period on the 17th day of November, A. D. 1910, that his return did not constitute an entry within the meaning of section two of the amendment to the Immigration laws passed and approved March 26th, 1910.

7. The court erred in holding that by Section 3 of said act, it is necessary, before an alien can be deported because of his importing alien women for illegal purposes, that he be first convicted of the criminal offense as provided for in Section 3.

8. The court erred in holding that Congress has limited the right to deport to cases where a conviction has been had, and for other purposes appearing in the record.

Eleventh. That the case came on to be heard in said Circuit Court of Appeals on the 10th day of January, 1912, before John W. Warrington, Loyal E. Knappen, circuit judges, and John M. Kilits, district judge, and on the 13th day of February, 1912, said court rendered a judgment reversing the said judgment of the said Circuit Court, on the following grounds:

A. That the Windsor-Detroit entry constituted a reentry into the United States to which the Immigration laws relate and that a continued established domicile and occupation in the United States for six years immediately following a lawful entry, when the alien was regularly admitted after having passed immigration inspection does not operate to remove the alien from that class as provided in Section 21 of the Immigration Act 34, Stat at Large, page 905, vesting power in the Secretary of Commerce and Labor to deport an alien who has been found here in violation of the act within three years after landing or entry and to return him to the country whence he came.

B. That the right to deport in this case may be found also in Section 3, in connection with Section 21, without regard to conviction or acquittal under Section 3 alone.

C. That provisions in Acts 20 and 21 of the Immigration Law providing for return "to the country whence he came," refers to place of nativity and citizenship regardless of fact that entry with reference to which it is sought to deport alien relates to another foreign country.

A certified copy of the entire record in the case, in the said Circuit Court of Appeals, is furnished and hereto annexed as a part of this application in conformity with

Rule 37 of this court relative to cases from Circuit Court of Appeals and the same is marked Exhibit A.

Twelve. Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in said case is erroneous and that this Honorable Court should require said case to be certified to it, for its review and determination under and in conformity with the provisions of the 6th Section of the Act of Congress, entitled "An act to establish Circuit Court of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by said Act.

Thirteenth. That the learned Circuit Judge in the Circuit Court of Appeals, in his opinion, makes mention of the fact and your petitioner is advised and believes that "There is a diversity of judicial opinions upon the subject of temporary absence of an alien from this country and his re-entry and your petitioner is advised and believes that there is a diversity of judicial opinions on the question as to the country to which an alien may be deported, under the provisions of the Immigration law providing for return "to the country whence he came," when after a temporary absence such alien re-enters the United States from another foreign country other than the country of his nativity and citizenship and it is with reference to such re-entry that the order for deportation is made.

Fourteenth. That your petitioner is advised and believes that the purpose of vesting in the Supreme Court supervisory jurisdiction was to secure uniformity of decision and to avert diversity of judgments among the several circuits and that therefore it is of great importance and of much consequence that the entire Record in this case in the Circuit Court of Appeals, involving numerous questions upon which there is a diversity of judicial opinion, and which have never been before this Honorable Court, should be certified to it for its review and determination.

Fifteenth. The importance and gravity of the questions here involved and which your petitioner respectfully requests this Honorable Court to review and determine, is obvious when we contemplate the thousands of aliens who are annually coming to this country, and the rights under our Constitution and Treaties of the

millions who have long established domiciles in the country, and have acquired education, property rights and social standing here.

Sixteenth. Your petitioner thus respectfully submits that the question upon the legal and just construction of the several sections of the Immigration Act of February 20, 1907, as amended March 26, 1910, involved in, and presented by the case of your petitioner, should be authoritatively and finally adjudged by this Honorable Court upon and after a full presentation to the court of the merits of said questions on the part of the petitioner and the respondent herein.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled G. Oliver Frick, United States Immigration Inspector in Charge, appellant, vs. Samuel Lewis, appellee, No. 2200, to the end that the said case may be reviewed and determined by this court as provided in section 6 of the act of Congress, entitled, "An act to establish Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

PHILIP T. VAN ZILE,
Counsel for Petitioner.

FREDERIC S. FLORIAN,
GUY W. MOORE,
H. P. WILSON,
Attorneys and of Counsel for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

SAMUEL LEWIS, PETITIONER,
v.
G. OLIVER FRICK, UNITED STATES IMMIGRATION INSPECTOR IN CHARGE. } No. 1010.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT.

STATEMENT.

This was an application to the Circuit Court for the Eastern District of Michigan for a writ of habeas corpus to obtain the discharge of petitioner from the custody of the immigration inspector, who held him under a warrant of deportation issued by the Secretary of Commerce and Labor.

Petitioner came to this country originally from Russia, entering at the port of New York on September 20, 1904, and lived in the vicinity of New York until March, 1910, when he went to Detroit, where he has since made his home (R., 23). November 17, 1910, he went across the river from Detroit to Windsor and brought back with him into this country a woman,

claimed to be his wife (ib.). He was subsequently indicted for bringing this woman into the country for immoral purposes, in violation of section 3 of the immigration act, but was acquitted March 23, 1911 (ib.).

Before the institution of the criminal proceedings, petitioner had been arrested upon warrant of the Secretary of Commerce and Labor in connection with the importation of this woman, and, on February 14, 1911, after a fair hearing, had been ordered deported by the Secretary, who held that he was in the country in violation of the immigration law as amended March 26, 1910, in this, to wit (R., 24):

> That the said alien was a member of the excluded classes in that he has been convicted of and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he procured, imported, and brought into the United States a woman for an immoral purpose; that at the time of his entry into the United States he was a person likely to become a public charge; and that he is unlawfully within the United States in that he secured admission by false and misleading statements thereby entering without the inspection contemplated by law; and may be deported in accordance therewith.

It was contended in the petition that the Secretary of Commerce and Labor had no jurisdiction to deport petitioner because he was a lawful resident

of this country, having been admitted by the immigration authorities on September 20, 1904. (R., 2.)

Some of the evidence and concessions before the Circuit Court are not in the record, but it was agreed (R., 22) that the facts may be considered as stated by that court in its opinion. (R., 22–30.)

The Circuit Court found the charges against the alien, except the one as to the importation of the woman, to be collateral to and to depend upon that charge or to be without any foundation. (R., 25–27.)

In regard to the contention that petitioner did not receive a fair hearing, the court said (R., 23):

> * * * Certain hearings and examinations were held before the inspectors. Complaint is made concerning some features of these examinations, and it is said that he did not have a fair hearing or such hearing as the law requires. So far as concerns the main question of fact into which the department undertook to examine, viz, the importing of the woman, I do not see sufficient ground for these complaints, and if the department had jurisdiction, under the existing circumstances, to hear and determine this question of fact and to deport upon that ground, I should not undertake to review its conclusion.

The Circuit Court held that, under the circumstances stated, the Secretary was without jurisdiction to deport petitioner, and directed his release. (R., 30, 31.) Upon appeal, the Circuit Court of Appeals reversed its judgment.

ARGUMENT.

I.

As to whether the immigration laws apply to domiciled aliens seeking to reenter the country.

There is some conflict of decision among the Circuit Courts of Appeals upon the question whether the present immigration act applies to aliens who have acquired a domicile in the United States and who seek to reenter the country after a temporary absence abroad. The great weight of authority is in line with the decision of the Circuit Court of Appeals for the Sixth Circuit in this case, that it does apply to them. It has been so held by the Circuit Court of Appeals for the Second Circuit in *Taylor* v. *United States* (152 Fed., 1) and *Ex parte Hoffman* (179 Fed., 839); by the Circuit Court of Appeals for the Third Circuit in *Sibray* v. *United States* (185 Fed., 401); by the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *Sprung* (187 Fed., 903); and by the Circuit Court of Appeals for the Seventh Circuit in *Prentis* v. *Stathakos* (192 Fed., 469). There is also a decision by a District Court in the Eighth Circuit to the same effect. (*Ex parte Petterson*, 166 Fed., 536.)

There are only two decisions of the Circuit Court of Appeals to the contrary, one by the Circuit Court of Appeals for the Ninth Circuit (*United States* v. *Nakashima*, 160 Fed., 842) and one by the Circuit Court of Appeals for the Fifth Circuit (*Redfern* v. *Halpert*, 186 Fed., 150), one Judge dissenting.

That the present immigration law applies to domiciled aliens seeking to reenter the country is to be inferred from the action of Congress in changing the law, which formerly applied only to an "alien immigrant," so as to make it apply to any alien, the word "immigrant" being omitted. That the change was made advisedly by Congress appears from the opinion of the Circuit Court of Appeals for the Second Circuit in the Hoffman case, where it was said (179 Fed., 840–841):

> The single question presented is whether the provisions of the act of 1907 apply to an alien, who after original entry into this country has remained here more than three years, and then, after a brief absence abroad, again seeks to enter the United States. We had this question of construction of act March 3, 1903, c. 1012, 32 Stat., 1213 (which is in this particular substantially the same as the act of 1907), before us in Taylor *v.* United States (152 Fed., 1; 81 C. C. A., 197), and do not think it necessary to repeat the long discussion which will be found in that opinion. We referred in that case to the history of the act as disclosed in the Congressional Record. It therein appeared that the question whether the new act should, like the original one of March 3, 1891, (26 Stat., 1084, c. 551 [U. S. Comp. St. 1901, p. 1294]), be restricted to alien immigrants, or should be broadened so as to cover aliens, whether immigrants or not, was thoroughly discussed in Congress. As the bill left the House it was broadly phrased.

> The Senate amended it in several particulars, so as to restrict its operation to immigrants. Upon conference, however, the House nonconcurred in these amendments, and the Senate withdrew them. We held that these proceedings clearly indicate that Congress was satisfied that the use of the word "immigrant" had given rise to a construction of the earlier acts which rendered them inadequate to accomplish their purpose, and made it necessary to adopt the broader term "alien." The Taylor case was reversed by the Supreme Court (207 U.S., 120; 28 Sup. Ct., 53; 52 L. Ed., 130), the court holding that the facts did not warrant a conviction (under section 18 of the act) of the captain of a vessel from which one of the ship's crew had deserted while in this port; but we find nothing in the opinion of the Supreme Court which indicates that this court was in error in holding that, despite its title, the excluding sections of the act applied to aliens generally, and not solely to alien immigrants.

In *Lem Moon Sing* v. *United States* (158 U. S., 538) this court, speaking by Mr. Justice Harlan of the reentry of a domiciled alien, said (p. 547):

> * * * Is a statute passed in execution of that power [to exclude aliens] any less applicable to an alien, who has acquired a commercial domicile within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to reenter it? We think not. The words of the statute are

broad and include "every case" of an *alien,* at least every Chinese alien, who, at the time of its passage, is out of this country, no matter for what reason, and seeks to come back. He is none the less an alien because of his having a commercial domicile in this country.

II.

As to whether the Secretary of Commerce and Labor had jurisdiction to deport petitioner for importing a woman for immoral purposes, notwithstanding his acquittal of the charge in the judicial proceedings.

Section 2 of the immigration act (34 Stat., 898), as amended March 26, 1910 (36 Stat., 263), provides:

> "SEC. 2. That the following classes of aliens shall be excluded from admission into the United States: * * * persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose; * * * .

By section 21 the Secretary has power to deport when he is satisfied that an alien is here "in violation of this act."

Section 3 also, in addition to prescribing punishment of fine and imprisonment for the importation of an alien for such purpose, provides—

> that the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden. * * *

The power to deport an alien entering the United States in violation of the immigration laws is in the

Secretary of Commerce and Labor; the power to punish any "person," whether an alien or not, for bringing in women or girls for immoral purposes is in the courts. The two jurisdictions are separate and distinct; hence, the action of the one can have no legal bearing upon the other, and there is nothing in the statute that suggests that Congress intended that an alien acquitted of a charge cognizable by both, but for different purposes, should not be subject to the jurisdiction of the other.

The decision of the Circuit Court of Appeals in this case, that the Secretary could deport petitioner notwithstanding his acquittal in the judicial proceedings, is supported by the decision of the Circuit Court of Appeals for the Second Circuit in *Williams* v. *United States* (186 Fed., 479), where it was held that the acquittal of an alien in a criminal prosecution for falsely claiming citizenship was not a bar to proceedings for deportation for having obtained admission into the United States in violation of the immigration laws by fraudulently representing himself to be a citizen.

As to whether there was evidence before the Secretary warranting the finding that the woman referred to was imported for immoral purposes, it is sufficient to quote from the opinion of the Circuit Court (R., 27):

> * * * The jury found Lewis not guilty. From my familiarity with the evidence, I can say I think the evidence, as fully developed on the trial (it being, in a substantial way, the same as the evidence before the depart-

ment), justified a strong suspicion that Lewis was guilty, but did not justify a conviction under the rules of criminal law. The case is one where the courts could not review the conclusion of the department, if the department has jurisdiction to hear such question at all.

III.

The Circuit Court of Appeals also held that, under the terms of the immigration act authorizing the alien to be "returned to the country whence he came," the warrant for the deportation of Lewis to Russia, the country of his nativity and from which he originally came, was valid. There is no decision to the contrary. Two cases in lower Federal courts are cited by the Circuit Court of Appeals (*United States* v. *Redfern*, 186 Fed., 603; *United States* v. *Williams*, 187 Fed., 470), but, as pointed out in its opinion, they are not in conflict with its conclusion.

Respectfully submitted.

WILLIAM R. HARR,
Assistant Attorney General.

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AUTHORITIES CITED,

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

SAMUEL LEWIS, PETITIONER,
v.
G. OLIVER FRICK, UNITED STATES IMMIGRATION Inspector in Charge. } No. 208.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case is before this court upon a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

The petitioner, a native of Russia, came to the United States originally from Russia, embarking from London, England, on that journey, and arriving in New York City about September 20, 1904 (R., 5, 8). He lived in the vicinity of New York until March, 1910, when he went to Detroit, where he has since made his home. On November 17, 1910, he went from Detroit to Windsor, Canada,

remaining there not more than an hour or so, and brought back with him a woman, whom he claimed to be his wife. On February 14, 1911, he was ordered deported to Russia by the Secretary of Commerce and Labor for having brought this woman into the United States for an immoral purpose in violation of section 2 of the act of February 20, 1907, 34 Stat., 898 (R., 22).

The petitioner had been indicted in December, 1910, under section 3 of the act of 1907, as amended by the act of March 26, 1910 (36 Stat., 263), for the same act, and secured a stay of the execution of the warrant of deportation pending the trial. On March 23, 1911, he was acquitted of the criminal charge, which acquittal he submitted to the Secretary of Commerce and Labor, who, nevertheless, ordered the immediate execution of the warrant. Thereupon the petitioner sued out a writ of habeas corpus (R., 22–23).

The Circuit Court held that the petitioner was not an alien within the meaning of the immigration laws, and that if he was, he could not be deported for importing a woman into the United States for immoral purposes unless previously convicted of the offense, and ordered that he be discharged from custody, 189 Fed., 146 (R., 22–26). This decision was reversed by the Circuit Court of Appeals for the Sixth Circuit, 195 Fed., 693 (R. 33–40). The Supreme Court then granted a writ of certiorari, 225 U. S., 699.

STATUTE INVOLVED.

The following sections of the immigration act of February 20, 1907 (34 Stat., 898), as amended by the act of March 26, 1910 (36 Stat., 263), are involved:

SEC. 2. That the following classes of aliens shall be excluded from admission into the United States * * * persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose.

SEC. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, * * * shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. * * * Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen, in the manner provided in sections twenty and twenty-one of this act.

SEC. 20. That any alien who shall enter the United States in violation of law, * * * shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came

at any time within three years after the date of his entry into the United States.

SEC. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this act * * *.

SEC. 35. The deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory.

BRIEF OF ARGUMENT.

To uphold the warrant of deportation the Government maintains the following five propositions:

I. The act of February 20, 1907 (34 Stat., 898), as amended by the act of March 26, 1910 (36 Stat., 263), applies to resident aliens like the petitioner.

II. The act of 1907 as amened by the act of 1910 does not make a conviction a condition precedent to the deportation of an alien who has imported a woman into the United States for immoral purposes.

III. The acquittal of the petitioner under the in-

dictment is not *res adjudicata* of the right to deport him.

IV. The criminal and deportation proceedings against the petitioner did not put him twice in jeopardy for the same offense.

V. The petitioner was properly ordered deported to Russia.

I.

The act of February 20, 1907 (34 Stat., 898), as amended by the act of March 26, 1910 (36 Stat., 263), applies to resident aliens like the petitioner.

This precise question has recently been determined in the Government's favor in the case of *Lapina* v. *Williams*, No.7, October term, 1913, decided January 5, 1914. It is true that in the *Lapina case* the petitioner was a prostitute without the shadow of a legal residence in the United States, while the petitioner in the present case apparently had such a residence (Tr., 9), but this difference of fact should not prevent the decision in the *Lapina case* from foreclosing the question involved here, there being no suggestion of any such distinction in the statute, nor in the opinion of the court, as appears from the following passage:

> Upon a review of the whole matter, we are satisfied that Congress, in the act of 1903, sufficiently expressed, and in the act of 1907 reiterated, the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation, to all aliens

> whose history, condition or characteristics brought them within the descriptive clauses, *irrespective of any qualification arising out of a previous residence or domicile in this country.*

The argument that the petitioner's return from Canada to this country was not an entry within the meaning of the act because it was merely the completion of what was intended to be a roundtrip *from* the United States *to* the United States is also disposed of by the *Lapina case*, since in that case there was a similar *animus revertandi*, the only distinction being in the length of the absence from the United States, which is of course immaterial. *U. S.* v. *Williams* (D. C. N. Y.), 187 Fed., 470.

II.

The act of 1907, as amended by the act of 1910, does not make a conviction a condition precedent to the deportation of an alien like the petitioner, who imported a woman into the United States for immoral purposes at the time of his own entry.

In *United States* v. *Wong You* (223 U. S., 67), it was held that where an alien is deportable under two separate statutes, both of which are in force, the Government may elect to proceed upon either statute. So if the method of deportation contained in sections 2, 20, and 21 of the act of 1907 is still applicable to the petitioner, in spite of the later amendment of section 3, the *Wong You case* is conclusive of the Government's right to use the method employed in the present case.

The petitioner is thus forced to the contention that the Government's right to deport him under the act of 1907 has been impliedly repealed by section 3, as amended by the act of 1910, with the result that he is not now subject to deportation, because he has not been convicted of a violation of the provisions of this section.

The combined effect of sections 2, 20, and 21 of the act of 1907 was that an *alien* procurer of alien prostitutes should be denied admission into the United States, or that if he succeeded in gaining admission by evading the immigration authorities he might still be deported to the country whence he came, if discovered within three years after his unlawful entry. These sections thus extended only to aliens whose entry into the United States was *unlawful*. For convenience such aliens will be referred to as class A.

Section 3 of the act of February 20, 1907, before being amended by the act of March 26, 1910, provided:

> SEC. 3. * * * whoever shall, directly or indirectly, import or attempt to import into the United States any alien or girl for the purpose of prostitution, or for any other immoral purpose * * *, shall, in every such case, be deemed guilty of a felony, and on conviction thereof shall be imprisoned. * * *

This section was directed against all persons. It was not limited to aliens, and reached and punished not only aliens of class A, whose deportation was provided for in sections 2, 20, and 21, but also aliens

who had lawfully entered the United States, and were not therefore deportable under the above sections. These aliens will be designated as class B.

It thus appears that under the act of 1907 aliens of class A might be deported to the country whence they came, as well as indicted, while those of class B might be indicted, *but not deported.*

The amendment of March 26, 1910, did not change section 2 of the former act in any particular material to this case, and left untouched sections 20 and 21. Section 3 was amended to read as follows (after providing that whoever imported an alien prostitute into the United States should be guilty of a felony in like manner with the act of 1907):

> *Any* alien who shall be convicted under any of the provisions of this section, shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, *or of which he is a subject or a citizen* in the manner provided in sections twenty and twenty-one of this act.

The effect of this provision upon aliens of the latter class was undoubtedly to give the Government the right to deport them, a right which it did not have under the act of 1907. The new right, however, was made available only after a conviction and the expiration of the sentence incurred thereby, since the aliens to whom it applied had lawfully entered the United States and in many cases might have established residences here. It is contended that conviction being thus made a condition precedent to

the right to deport aliens of class B, the same condition attaches to the right to deport those of class A, since both classes are within the express languge of the amendment.

But while the amendment does not in terms distinguish between the two classes, it does not follow that its operation upon them is the same. Whether this is so must of necessity depend upon their respective status before the amendment was passed. As to aliens of class B it created a new right of deportation, subject of course to the condition prescribed, but as to those of class A, whose deportation was provided for in the act of 1907, and had been so provided for in the act of 1903 (32 Stat., 1213), it had no such application. It can not be presumed that Congress intended to curtail or postpone the expeditious and long tried remedy established by these statutes by enacting the amendment of 1910, the avowed purpose of which was to shut down more tightly on all phases of so-called "white slavery." The construction contended for here gives full effect to this purpose, for it not only preserves all the Government's prior rights of deportation, but at the same time confers upon it the right to deport a class of aliens which it could not deport before.

But aside from being thus opposed to the legislative intent, the implication of a repeal is strongly negatived by the fact that the amendment upon which it is sought to be based is not to any of the sections which contain the old method of deportation, but to section 3, which authorized the criminal

punishment of alien procurers as distinguished from their deportation.

The construction urged by the Government is not open to the objection that it entirely excludes aliens of class A from the operation of the amendment. If such an alien is convicted of a violation of section 3, the amending clause takes hold of him and authorizes his deportation to either the country whence he came or *the country of which he is a subject or citizen*, the latter alternative not being possible under the act of 1907. The amendment is thus construed to have created new rights with respect to both classes of aliens, one authorizing the deportation of aliens of class B and the other enlarging the territory to which aliens of class A may be deported, a conviction under section 3, however, being a condition precedent to the exercise of both rights.

Under the existing law, therefore, the Government has two methods of dealing with an alien like the petitioner. It may deport him at once by virtue of sections 2, 20, and 21 of the act of 1907 to the country whence he came, or it may have him convicted of a violation of section 3, and, after his sentence has been served, deport him to either the country whence he came or the country of which he is a subject or citizen. It is free to elect either method (*U. S.* v. *Wong You*, *supra*.). Having elected the former method in the present case, the failure to convict the petitioner does not act as a bar to his deportation, as contended, but merely limits the place to which he may be deported to the country whence he came.

The holding of the Circuit Court below, which is the only authority to the contrary, was based upon the decision of the Circuit Court of Appeals for the Second Circuit in the *Wong You case* (181 Fed., 313), which was subsequently reversed by the Supreme Court (*U. S.* v. *Wong You, supra*).

The petitioner's contention was squarely repudiated in *Ex parte Pouliot* (D. C. Wash.; 196 Fed., 437), the only other case in point which has been found.

III.

The acquittal of the petitioner under the indictment is not res adjudicata of the right to deport him.

Under section 21 of the act of February 20, 1907 (34 Stat., 898, 905), the Secretary of Commerce and Labor has power to deport when he is "satisfied that an alien is unlawfully in the United States." A jury, on the other hand, can not convict unless satisfied of the defendant's guilt beyond a reasonable doubt. This difference in the degree of proof required to sustain a verdict for the Government in the two proceedings would, under the generally accepted rule, prevent the application of the doctrine of *res adjudicata* contended for by the petitioner.

Stone v. *U. S.*, 167 U. S., 178.

Micks v. *Mason*, 145 Mich., 212; 11 L. R. A. (N. S.), 653 and note.

State v. *Roach*, 83 Kans., 606; 31 L. R. A. (N. S.), 670 and note.

11 Columbia Law Review, 170.

To this general rule, however, an exception has been created by the decision in *Coffey* v. *U. S.* (116 U. S., 436, 443, 444). In that case it was held that a verdict of acquittal in a criminal proceeding for the violation of a statute was *res adjudicata* against the Government when it subsequently sought to enforce a forfeiture of the defendant's goods for the same offense. This rule was adopted in spite of the lesser degree of proof required to sustain a verdict for the plaintiff in the forfeiture proceeding (*Lilienthal's Tobacco* v. *U. S.*, 97 U. S., 237, 271), the court declaring "that the facts ascertained in a criminal case, as between the United States and the claimant, could not be again litigated between them as the basis of any statutory punishment denounced as a consequence of the existence of the acts."

The doctrine of the *Coffey case*, however, has been strictly limited to cases where the sovereign seeks to *punish* a defendant in another way for the same offense of which he has been acquitted. (*Chantangco* v. *Abaroa*, 218 U. S., 476.) It is inapplicable to civil actions to recover damages for the same act (*Stone* v. *U. S.*, 167 U. S., 178) and to proceedings in equity to abate a nuisance for which the defendant has been exonerated criminally (*U. S.* v. *Donaldson-Shultz Co.*, C. C. A., 4th C.; 148 Fed., 581), for the reason that the object and consequence of the second proceeding in these cases is not *punishment*.

Thus the precise question presented for decision is whether the deportation of an undesirable alien is a punishment within the meaning of the rule in the

Coffey case. This question has been answered in the affirmative by a district court (*Chin Kee* v. *U. S.*, 196 Fed., 74) and in the negative by the Circuit Court of Appeals for the Second Circuit (*Williams* v. *U. S.*, 186 Fed., 479).

There is an undoubted distinction between a judicial forfeiture of property such as was involved in the *Coffey case* and a deportation of an alien on the ground existing in the case at bar. A forfeiture seeks to take away property lawfully acquired by the claimant but used by him in a manner contrary to law and is essentially punitive. (*U. S.* v. *Reisinger*, 128 U. S., 398.) A deportation, however, is not directed against any property or privilege which has been lawfully acquired, but merely seeks to take away something to which the alien was never entitled—the right to enter and remain within the United States. For this reason it has been uniformly held that proceedings to deport are not criminal and that deportation itself is not a punishment.

> *Fong Yue Ting* v. *U. S.*, 149 U. S., 698, 730.
>
> *Wong Wing* v. *U. S.*, 163 U. S., 228, 237.
>
> *Zakonaite* v. *Wolf*, 226 U. S., 272.
>
> *Bugajewitz* v. *Adams*, 228 U. S., 585.
>
> Cf. *Johannessen* v. *U. S.*, 225 U. S., 227, 242.

In *Fong Yue Ting* v. *U. S.*, *supra*, Mr. Justice Gray said (p. 730):

> The proceeding before a United States judge, as provided for in section 6 of the act of 1892,

> is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the Government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

And in *Bugajewitz* v. *Adams*, *supra*, Mr. Justice Holmes reaffirmed the doctrine in the following language (p. 591):

> The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want.

And in *Johannessen* v. *U. S.*, *supra*, Mr. Justice Pitney, in sustaining the validity of a statute providing for the annulment of fraudulently obtained certificates of citizenship, said (p. 242):

> The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges.

The precise distinction contended for here was recognized by the Supreme Court in *Wong Wing* v. *U. S.*, *supra*, where it was held that although the deportation of aliens could be lawfully determined without a judicial trial, the *punishment* of aliens by imprisonment or *confiscation of property* could not be so determined.

The doctrine of the *Coffey case* is thus not controlling and there is no difficulty in holding that the acquittal of the criminal charge in the present case is not *res adjudicata* of the right to deport.

IV.

The criminal and deportation proceedings against the petitioner did not put him twice in jeopardy for the same offense.

If deportation is not a punishment, it follows that the guaranty against double jeopardy is inapplicable. It has been specifically held that an alien who faces deportation proceedings is not put in jeopardy.

> *Sire* v. *Berkshire* (D. C. Tex.), 185 Fed., 967.
> See *Pearson* v. *Williams*, 202 U. S., 281.

V.

The petitioner was properly ordered deported to Russia.

Preliminary questions arise as to the power of the court to consider the petitioner's contention on habeas corpus, and as to the nature of the relief which can be granted him, if it appears that his destination, as ordered, is illegal.

While this court has granted a writ of habeas corpus to a prisoner who is actually confined in a prison to which he could not legally be sentenced by the court which tried him (*In re Mills*, 135 U. S., 263; *In re Bonner*, 151 U. S., 242), it has always held that if a prisoner be legally detained and at a proper place at the time he petitions for the writ, his petition must fail notwithstanding the fact that his detention *will* become illegal in the future. The petition is premature *until* the *detention* becomes *in some respect unlawful*.

Ex parte Lange, 18 Wall., 163.
In re Swan, 150 U. S., 637, 652.
U. S. v. *Pridgeon*, 153 U. S., 48.
De Bara v. *U. S.* (C. C. A. 6th C., Taft, Lurton, and Day), 99 Fed., 942.

Upon similar reasoning it has been held that an alien who has been ordered deported can not challenge the legality of his destination on habeas corpus, if it appears that he is one of an excluded class and is thus properly in custody. (*U. S.* v. *Williams*, D. C.

N. Y.; 187 Fed., 470.) In that case the proposition was thus stated by Judge Hand:

> Two questions therefore arise: First, whether Austria is the country whence he came; and, second, whether, if this be not so, a writ of habeas corpus can inquire into his proposed destination. I do not think that it is necessary to determine the first question, for I do not see how a writ of habeas corpus can review such a mistake, if it be a mistake, on the part of the authorities. That writ inquires simply into the validity of the relator's detention, and concededly his detention is legal. Even if it be true that the Secretary of Commerce and Labor intends to deal illegally with him, and even when that intention appears from the very warrant under which he is detained, the writ on that account could not release him from custody, unless he has the right to remain in the country, which he has not.
>
> It is suggested that he might be released upon the theory that his detention would become illegal as soon as they did with him what the law does not permit. The difficulty with this argument, however, is that he would none the less be properly in custody and subject to deportation, because they were violating the law in sending him to the wrong place. The detention being legal, at most a court could direct the Secretary of Commerce and Labor to send him to Canada, and not to Austria; but that, of course, no court has jurisdiction to do. It is only after the court has adjudged that the alien has a right under the statute to

remain in the country that a writ of habeas corpus can release him (*Chin Yow* v. *U. S.*, 208 U. S., 8.).

It is true, however, that a majority of the courts which have passed on the question have not hesitated to inquire into the legality of the place of intended deportation on habeas corpus proceedings.

Lavin v. *Le Fevre* (C. C. A., 9th C.), 125 Fed., 693.

Lui Lum v. *U. S.* (C. C. A., 3d C.), 166 Fed., 106.

Ex parte Yabucanin (D. C., Mont.), 199 Fed., 365.

U. S. v. *Ruiz* (C. C. A., 5th C.), 203 Fed., 441.

U. S. v. *Sisson* (C. C. A., 2d C.), 206 Fed., 450.

But conceding that the legality of the petitioner's destination may be questioned on habeas corpus, and that the destination directed in this warrant is illegal, still the petitioner is not entitled to be discharged, but only to have the warrant amended so as to conform with the requirements of the law.

In re Bonner, supra.

Wong Wing v. *U. S., supra.*

Ex parte Yabucanin, supra.

U. S. v. *Ruiz, supra.*

U. S. v. *Sisson, supra.*

In re Tani, 29 Nev., 385; 13 L. R. A. (N. S.), 518 and note.

THE MAIN QUESTION.

Passing to the merits of the petitioner's contention, the question presented is whether "the country whence he came" means, under the facts existing when this deportation order was made, (1) the country from which the petitioner originally came to the United States (Russia); or (2) the country of the trans-Atlantic port at which on that journey he embarked for the United States (England); or (3) the country from which he last came back into the United States (Canada).

The question was not, and could not have been involved in the *Lapina case*, since in that case both entries were from the *same* foreign country. Nor has any case been found in which the statute has been construed as to two entries, from different countries, the first lawful and the second unlawful, as here.

In support of the contention that his deportation must be to Russia, by way of London, or to London, it is submitted:

(1) The words "country whence he came" represent the country *from which he started* on a journey, the final destination of which he had then determined should be some point within the United States. Thus tested, Canada as a point of deportation, becomes impossible; because the journey (on which, after an hour's presence in Canada, he returned to the United States) had its *origin* in the United States, *for when he started from Detroit* to go to Windsor, he then had a fixed purpose to return into the United States the same day. This view is not at all incon-

sistent with the idea that having left the United States and returned again within its borders on the same single journey, he made in fact, a new entry into the United States *in the course of that journey*, which entry was unlawful because of the circumstances under which it was made.

(2) That the country whence he came is the country in which the journey started is borne out by the fact that the act elsewhere refers (sec. 12) to the "*final destination*" beyond the port of entry in the United States, and also (sec. 21) to the "*final destination*" of the alien in deportation, thus covering both *termini* of the journey. Also by the fact that the act repeatedly uses the words "entry," "enter," "entering," "entered," "port of arrival," "seeking admission from *contiguous foreign* territory" (sec. 1), "embarkation *for foreign contiguous territory*" (sec. 35). This forces the conclusion that the words "country whence he came" can not be limited in every case to the country from which he immediately *entered* and that the different language was advisedly used to convey a broader meaning.

The framers of the act were keenly alert to the difference between the country in which was the port of embarkation, the country from which the alien may have immediately entered the United States, the country in which the journey began which resulted in the entry into the United States, and the country which was the country of citizenship or nativity of the alien. We have prepared and attach hereto as an appendix references to lan-

guage in the various sections of the act showing how these several points were distinguished and in terms referred to in the framing of the act. This summary makes clear that the words "country whence he came" were advisedly and carefully used. We insist that the true meaning of this language and the intent of the framers of the law in using this language was, that when deported the alien should be sent, if unconvicted of crime here, to that country in which he was when he started upon the journey the *final destination* of which he then meant to be and afterwards accomplished to some point within the United States. In referring to Canada and Mexico, all through the act they are either referred to in specific terms as the "Dominion of Canada," and the "Republic of Mexico," or as "foreign contiguous territory." Of course, the language "to the country whence he came" must be given a meaning broad enough to include Canada if it be the country of which the alien to be deported was either a subject or citizen or in which he was staying when he conceived the purpose of entering the United States. But this result would ensue under the interpretation which we urge for this language.

Were the words held synonymous in all cases with the *country from which he immediately entered*, then in the case of an alien embarking from a trans-Atlantic port through Canada, the provision of section 35 would be rendered nugatory; as would also the provision "*or* of which *he is* a subject or

citizen" (amendment of 1910 to sec. 3), in the case of a *convicted* alien, who is a subject or citizen of a European country. All these sections negative the inference that "the country whence he came" must necessarily be the country of *immediate entry*, and it was so held in *Lavin* v. *Le Fevre* (C. C. A., 9th C.; 125 Fed., 693). There the petitioner unlawfully entered the United States from France, subsequently went to Canada, and upon her reentry here was ordered deported to France, although Canada was the country of immediate entry. The court held the warrant of deportation valid under the immigration act of 1891, which provided that aliens who unlawfully entered the United States should be immediately sent back to the country whence they came on the vessels bringing them. This provision appears in section 19 of the present act.

The Circuit Court of Appeals for the Second Circuit, about the middle of this month, decided in the case of *United States ex rel. Hans Bauder* v. *Uhl, Commissioner*, that having been excluded at the time of his first attempted entry into the United States because he then had with him a woman whom he was importing for immoral purposes, the petitioner thereby became forever disqualified from entry. And though he had several times thereafter, and from different countries, entered in an unobjectionable manner, having been seized under one of the later entries, he was rightfully deported, and to Switzerland, the country from which he first attempted entry into the United States. Of course, in that case the original attempted entry was

unlawful, but the first and every subsequent entry, considered individually, was free from objection, save as affected by the initial attempt. The case is at least authority to the effect that in the selection of the place to which the alien shall be deported the officers are not limited to some point in connection with the journey of last entry upon which the alien was apprehended.

(3) The argument will undoubtedly be made that because the deportation was based on the last and unlawful entry *from* Canada that therefore the deportation can only be *to* Canada. We concede that the *right* to deport was based on the unlawful entry or return from Canada. But we insist that the conclusion as above is wholly unsound. Whether an alien is in the United States in violation of the law is one question. What is "the country whence he came" is another question. And each may be decided without *reference to the other*. That Lewis was unlawfully in the United States must have been decided before the question of the place to which he should be deported could be reached for consideration. The latter question is not necessarily determined by any particular entry but by the reference to the substantial facts in the case. Especially is there no necessary limitation to the particular incoming or return that forms the basis of the previous adjudication of unlawful entry. Other and larger considerations enter into this second question.

The act was framed with a sense of the obligations owing by this Government to other nations under principles of international law in connection with

the disposition of immigrants who might be under our policies objectionable. Section 39 of the act empowers the President to call "an international conference * * * or send special commissioners to any foreign country for the purpose of regulating by international agreement * * * the immigration of aliens to the United States; of providing certain * * * examination of such aliens * * * at the ports of embarkation or elsewhere," etc. There is present in the act, we insist, recognition throughout that the return of objectionable or criminal aliens should be to that country which in good conscience should bear the burden of responsibility. This country is either the country of which the deported alien is a citizen or the country in which he was when he started on the journey with a then purposed point of final destination in the United States. We think that the amendment to section 3 in the act of March 3, 1910, recognizes a distinction in this respect between aliens convicted under the act (i. e., criminals) and aliens not convicted. As to the former (criminals), they are deportable either to the country wherein their journey to the United States had its origin or to the country of citizenship, whichever might seem morally more responsible for them. And this larger discrimination in deportation was lodged, because in this case convicted criminals, as distinguished from persons merely objectionable under the policy of our laws, were being dealt with.

As supporting the idea that, in the exercise of the power to deport, there is no restriction to the last incoming or return, or to a journey resulting in an *unlawful* entry as distinguished from one resulting in a *lawful* entry, we suggest that a mere privilege, and not a right, is bestowed upon the alien under the act; that so long as he remains an alien, he is here by favor and not of right; that when he enters (lawfully, if you please) he does it with the implied condition that during the period of his stay as an alien in this country he will so comport himself as not to ate the provisions of the act, and so be entitled to remain; and that upon breach by him of this obligation the privilege originally granted him stands forfeited, and he may be deported therefore, to the country from which he originally came as an alien to this country.

(4) Moreover, the act itself does not require that the journey to be considered in determining the "country whence he came" should be a journey in the course of which an *unlawful* entry was made into the United States. This is made manifest by the provisions of section 3 declaring in substance that an alien woman or girl who might be found practicing prostitution within three years after entering the United States "shall be deemed to be unlawfully *within* the United States, and shall be deported as provided in sections 20 and 21 of this act." If the practice of prostitution began, as it might, after entering into the United States, her entry would have been perfectly lawful, but by reason of the after

practice she would have become unlawfully within the country; and though her original entry was lawful, yet that entry and the journey which produced it would necessarily be considered in determining the country whence she came and the place to which she should be deported.

We may add the case of an alien who himself lawfully entered the United States, but afterwards received, held, and controlled women within the United States for immoral purposes. Such an alien, if *convicted*, though guilty of no unlawful entry whatever, would be subject to deportation under the act, and in determining the place to which he should be deported, the consideration of locality could not be limited to an unlawful entry—for there was none. It would necessarily be predicated upon the termini of the journey which represented his first or some later entry into the United States—it or all of them being lawful.

This is also true of those who, within the period fixed by the law after lawful entry, become public charges, and therefore subject to deportation. Other examples might be discovered under the provisions of the act.

(5) Limiting the deportation of an alien either to the country from which he last immediately entered or returned, or to the country from which he illegally entered, would in many cases lead to anomalous results not only from the standpoint of this country but from that of the foreign country as well. This is well illustrated by the case at bar. Here is a Russian

alien who came from Russia to the United States. To order him deported to Canada would thrust him upon a neighbor country, even less responsible for him than we are; for we voluntarily admitted him within our boundaries. He never was a citizen or subject of Canada; never owed it any allegiance; never was even a part of its population; and never resided or was domiciled there. The policy of attempting to return to an innocent and totally unrelated country, derelict and undesirable aliens merely because they effect an illegal entry or return from its territory, can hardly be justified under any theory of international comity. And it can not lightly be presumed that Congress intended such a result. Indeed, it appears from the following language in the Senate report on the act of 1903, that the purpose was just the opposite:

> Section 36 (now section 35 of the act of 1907) provides that the deportation of aliens found unlawfully in the United States shall be to the *transoceanic* countries from which they came, *thereby avoiding the ineffective transfer of such persons, in case of their having obtained access to this country from foreign contiguous territory, to points whence they can readily return* (S. Rept. 2119, p. vii, 57th Cong., 1st sess.).

Moreover, Canada has properly protected itself against such an affliction; and would absolutely refuse to receive this alien from the United States unless a $500 head tax were paid for him. This payment

can not be made under existing conditions. And we would therefore be confronted with the case of an alien within our borders subject to deportation, but no place on earth to which he could be deported.

From the standpoint of the petitioner, too, deportation to Canada is entirely incongruous, since (for aught that appears in the record) he has never visited that country but once in his life, and then only for a few hours. His domicile and his affiliations are wholly Russian.

The country whence an alien came is thus more properly to be construed as being the country of his *original* rather than his *illegal* or *last* entry, for the simple and cogent reason that in nine cases out of ten the former will be a country where he belongs, while the latter will not.

It may be noted in this connection that section 12 of the act, which enumerates what shall be contained in the lists to be furnished at the port of arrival concerning incoming aliens, requires "the nationality, the race, the *last residence*, and *name and address* of the *nearest relative in the country from which the alien came*." This clearly carries the suggestion that by "the country whence he came" is meant some country in which he might be likely to have relatives, i. e., where he might be said to belong when he started for the United States.

(6) The following illustration explains the theory of the Government as to the application and meaning of the language to be construed as applied t a case in which there is more than a single entry:

The parents of a child born in Russia migrate when he is 5 years of age to Austria, taking him with them. He there grows to manhood; determines at 21 years of age to come to the United States, embarking at Cherbourg, France, for Montreal, with ultimate destination New York City. After lawfully entering the United States he goes across to Canada—purposing, when leaving the United States, to immediately return; and does so. This, his second entry, is unlawful. In this case the alien, because his original entry was lawful, must be convicted of a violation of section 3 before he can be deported to Russia, the country of which he is a citizen. If *not convicted*, he is nevertheless subject to deportation. And, having embarked from a trans-Atlantic port, section 35 requires that he be returned to Austria through the port of Cherbourg, unless section 35 limits the final destination point in deportation. In any event the "country whence he came" in the supposed case would always be either Austria, or France; and in the case at bar either Russia or England.

The difficulties attending the question arise largely from the fact that the framers of the act did not provide specifically for the case of successive entries. If, however, they had entertained the broad view of the meaning of the words "country whence he came" that we are contending for, of course no selection as between successive journeys of entry would have been necessary in drafting the act.

We are advised that the practice of the Department of Labor under the act has conformed to the view we are here contending for.

CONCLUSION.

We therefore conclude:

That when he returned from Canada, the petitioner unlawfully reentered the United States and became subject to deportation despite his acquittal of the criminal charge; that the order deporting him to Russia will return him to the "country whence he came" within the meaning of the act; and that the decision of the Circuit Court of Appeals should be affirmed.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

JANUARY, 1914.

APPENDIX.

34 Stat., 898.

Section 1. The tax of $4 "for every alien *entering* the United States" is payable to the collector nearest the port or district *to* "*which* such alien *shall come*."

Aliens who have had "an *uninterrupted* residence of at least one year *immediately* preceding *such entrance* (in the Dominion of Canada, Newfoundland, Republic of Cuba, or Republic of Mexico)" are excepted.

Secretary may arrange with transportation lines for payment of tax so imposed "upon any or all aliens *seeking admission* from *foreign contiguous territory*."

President may refuse to let passport-holding aliens "*enter* the continental territory of the United States *from such* other country," etc.

Section 2. Act does not apply to aliens "in immediate and continuous transit through the United States to *foreign contiguous territory*."

Section 3. "Within three years after she shall have *entered* the United States."

Section 8. "Any alien * * * not lawfully entitled to *enter*."

Section 9. "In which the *port* of *arrival* is *located*."

Section 12. "To deliver to the immigration officer at the *port of arrival* lists * * * made at the time and *place* of *embarkation*," stating "the *nationality*, the race, the last *residence*, the name and address of the *nearest relative* in the *country from which the alien came*." * * * "The *final destination*, if any, *beyond* the port of landing." "Whether ever before in the United States, and if so, when and where."

Section 19. All aliens brought unlawfully shall be "sent back to the *country whence they* respectively *came* on the *vessels bringing* them."

'Or fail to *return them* to the *foreign port from which they came.*"

Section 20. "Any alien who shall *enter* the United States in violation of law" shall be deported "*to the country whence he came,*" "by whom the alien was unlawfully induced to *enter.*"

Section 21. "And *returned to the country whence he came.*" "Who shall accompany such alien to his or her *final destination.*"

Section 24. "Touching the right of any alien to *enter* the United States."

Section 25. "The various *ports of arrival.*"

Section 32. "Rules for the entry and inspection of aliens along the borders of Mexico and Canada."

Section 35. "Aliens arrested within the United States after *entry* and found to be illegally therein," shall be deported "to the *trans-Atlantic* or *trans-Pacific ports from which the alien embarked* for the United States." "Or if such embarkation was *for foreign contiguous territory* to the foreign port at which said alien embarked *for such territory.*"

Section 36. "All aliens who shall *enter* the United States, except * * * shall be adjudged to have *entered* the country unlawfully and shall be deported as provided for in sections 20 and 21 of the act."

Section 42. "Passengers who have been taken at any port or place in a foreign country or dominion (ports and places in *foreign territory contiguous to the United States* excepted)."

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No. ~~1010~~ ? ~~574~~ 208

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1911

SAMUEL LEWIS,

Petitioner.

vs.

U. OLIVER FRICK, United States Immigration Inspector, In Charge,

Respondent.

BRIEF OF PETITIONER

Philip T. Van Zile
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Frederic S. Florian,
Guy W. Moore
H. P. Wilson,

Attorneys and of Counsel
for Petitioner.

Dated, Detroit, Michigan, March 11, 1912.

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BRIEF OF PETITIONER

STATEMENT.

The printed record filed in this court by appellant embodies the petition of Samuel Lewis, appellee in this case for writ of habeas corpus, in which is included as Exhibit A, the hearing in the matter of his examination before the Immigration Inspector on which is based the warrant ordering his deportation.

On page 8 of the record, is found *appellee's* testimony to the effect that he entered the United States at New York City, September 20, 1904, and that he was then examined and regularly admited into the country by the Immigration

Authorities. The record discloses also that appellee is a native of Russia and that prior to his coming to this country from Russia (R., 6) he was married by a Rabbi of the Jewish faith to Leah, a daughter of Isaac, with whom he lived 5 or 6 months when he left her and came to the United States, landing in New York about September 20th, 1904. He resided in New York until March 10, 1910, when he came to Detroit (R., 9). Since coming to Detroit he has lived at number 153 Napoleon Street, which is at the present time his home and which was his home continuously from that time until he was indicted by the Federal Grand Jury.

Lewis also testified (R., 10) that during the time he lived in New York City he was arrested once; that he did not know what charge was made against him, but that he was fined ten dollars ($10.00), which he paid. It does not appear that the guilt of any charge was proven or that at any time did Lewis admit the guilt of any offense. Lewis also stated that he did not see his wife Leah after coming to America until he met her at Windsor (R., 11) on November 17, 1910; that on that day he went to work in the morning and at dinner time when he returned home Mr. Berman was waiting for him and Berman told him that he had received a telegram that his wife and Lewis' wife were coming here and that he wanted Lewis to go over to Windsor with him to meet them; that he went over to Windsor and "stood there about 15 or 20 minutes and got on a train to the station at Windsor and met her there," and that they came over to the Immigration Office; that at the Immigration Office (R., 12) he took an oath that she was his wife and they then went to his home at number 153 Napoleon Street, but she refused to stay there because she said "The house isn't clean and somethings." She did not stay with him and he heard Sunday morning that she had been arrested.

Lewis stated further (R., 13) that he had never been divorced and that neither Leah Lewis nor Berman told him that she (Leah) had left a man by the name of Hochberg in London; that at Leah's request, he (Lewis) stated at the Immigration Office that she had been living in Detroit and had simply gone across that day to Canada; that he then stated that she had come from Canada and they made him pay four dollars ($4.00) head tax for her; that he had never been arrested in Detroit except this time and that he never knew that Leah was a shoplifter and when he brought her here he did not want her to do any wrong (R., 16). On May 16, 1906, Lewis declared his intention of becoming a citizen of the United States. (R., 17, Exhibit F.)

On December 9th, 1910, Lewis was indicted by the Grand Jury on the charge that on the 17th day of November, 1910, he imported and brought to the country an alien woman for an immoral purpose in violation of Section 3 of the Immigration Law as amended March 26, 1910. On March 23, 1911, the indictment came on to be tried in the District Court for the Eastern District of Michigan, Southern Division. The trial jury rendering a verdict of not guilty.

The warrant directing the deportation of Lewis to Russia contained the following formal allegations which are the same as are incorporated in the findings of the Secretary of Commerce and Labor, to-wit:

> "That the said alien was a member of the excluded classes in that he has been convicted of and admitted having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he procured, imported and brought into the United States a woman for an immoral purpose; that at the time of his entry into the United States he was a person likely to become a public charge; and that he is unlawfully within the United States, in that he secured admis-

sion by false and misleading statements, thereby entering without the inspection contemplated by law."

On April 13, 1911, a writ of habeas corpus was allowed from the District Court, the hearing thereon being had the following day. In answer to the petition for the writ of habeas corpus the Immigration Inspector, as respondent, recited (R., 21) that petitioner was on the 24th day of November, A. D. 1910, placed under arrest by virtue of a warrant from the Department of Commerce and Labor * * *. That the Secretary of Commerce and Labor had adjudged that said alien was a member of the excluded classes. On April 21 (R., 31) an order was entered discharging petitioner, but granting a stay of the discharge to enable the District Attorney to perfect an appeal if desired.

INTRODUCTION.

The importance of this case will at once appear. It involves much more than the liberty of an individual and the rights of an alien resident to freedom of movement and protection of person and property. The decisions on the questions here involved, determine in a measure the status of every resident of the country and of every person sojourning here whether citizen or alien.

Aliens have always been allowed to reside in the United States, acquire property here and enjoy the rights and privileges of citizenship to this extent at least, that their right to leave the country temporarily and to return after a sojourn abroad either to the land of their nativity or other foreign country has never been questioned and this right has been recognized though such aliens may have elected to maintain their citizenship in the country from which they originally came.

The unbroken current of authority since the earliest reported cases, is that an alien not a member of any of the inhibited classes who has without any fraud, deception or artifice gained admission to the country regularly and lawfully and has acquired a domicile here is not subsequently subject to inspection and exclusion under the Immigration Laws upon returning to the country after a temporary absence. It was so held in the case in Re Maiola, reported in the 67th Federal, 114. This case, however, differentiates between an immigrant and an alien and designates the party as an immigrant when coming to this country in 1892, at which time he was regularly admitted, but not as an immigrant when returning to the country in 1895 after a temporary absence.

Other cases covering the general proposition and applicable under the statute as now existing are numerous and will be cited in the body of the brief. It is equally well settled that errors of law by any executive department may be reviewed by the courts and that the Department of Commerce and Labor has no authority to deport an alien except such authority is given it by law.

BRIEF OF THE ARGUMENT.

I.

The authority of the courts to review the decisions of the Secretary of the Department of Commerce and Labor on Habeas Corpus, is well established by the numerous reported cases; this authority is unquestioned having been exercised by the judiciary and recognized by the department since its earliest existence.

II.

Appellee, Samuel Lewis, is not an alien, amenable to the immigration laws, and is not subject to inspection and deportation while residing lawfully and peaceably in the United States for the reason that he was admitted into the country lawfully and regularly in 1904. It is not claimed that he was guilty of any fraud, misrepresentation or deception and manifestly, he does not stand in the class of those aliens who have entered the country, fraudulently in the first instance, and who therefore, can acquire no rights which the government must recognize. Neither is he within that class of aliens, excludable under our laws who are "detained" or "duly held" at our borders.

III.

In the judiciary is vested the inherent and constitutional right to review errors of law by executive departments or any of the branches thereof, and no legislation has thus far attempted to deprive the courts of jurisdiction in cases wherein are involved erroneous conclusions of law. This applies with equal force to the Department of Commerce and Labor and other departments.

IV.

Whether the decisions of the Secretary of the Department of Commerce and Labor are final and conclusive on all questions involving immigration, or the rights of aliens in this country, include, necessarily, in its consideration, the question of the jurisdiction of the courts on habeas corpus and their right to review errors of law.

That the department's decisions, on all questions, are not final, appears to have been authoritatively settled.

V.

The rule that ~~where~~ cases brought within a particular enactment, are excluded from the general statute, relating thereto, is applicable in this case. Section 2 of the Immigration Act describes the classes of aliens who shall be excluded from admission into the United States, and Section 3 has taken from this general class a particular class, providing for deportation in case of conviction.

VI.

The rule, that where a warrant is not specific, or where sentence is illegal, the prisoner is entitled to his liberty, is also applicable in this case. Lewis was not sufficiently apprised in the warrant of what he was expected to meet and as the whole proceedings were based on the occurrences of November 17, 1910, the department in event of his conviction, had no authority under the law to order his deportation to any country other than Canada.

ARGUMENT.

The government of the United States is founded on the principles of "Justice, Freedom and Equality" as is outlined in the Constitution and propounded in the Declaration on which our independence is based. To ultimately realize these ideals, or as a means for the nearest approach thereto, the founders of the nation wisely provided that there should be three separate and distinct departments of government, namely, the Legislative, the Executive and the Judicial, the first or legislative department having power to ordain or prescribe the laws and to change, amend or repeal existing laws, the second or executive, having power to administer and enforce the laws and carry them into practical

operation and in the third or judicial, there is the power to apply the laws to contests or disputes between the state and private persons, or between individual litigants, and this power of necessity must include the power to review, interpret and construe the laws and render authoritative and final judgments thereon.

The principle of the separation of these three departments imposes upon each the limitation that it must not usurp the powers nor encroach upon the jurisdiction of either of the others, each being esteemed equal in dignity and authority within their respective spheres.

Thus the Federal Constitution provides that the legislative power shall be vested in a Congress of the United States, the executive power in a President and the judicial power in *one* Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. It is obvious therefore, that by reason of these wise provisions the president and the courts can not make laws, likewise congress and the courts are forbidden to usurp the functions of the executive, and the courts would be justified in declaring invalid any Act of Congress or rule of the executive department which would amount to an attempted exercise of judicial power. In view of these wise provisions it can not be presumed that it was intended that the Department of Commerce and Labor should exercise the functions of the judiciary in passing finally, upon the status of an alien residing in this country in a matter where the question of the lawful residence of said alien is involved and where his right to the constitutional security of person and property is an issue, for the fact must not be lost sight of, that it is undisputed that appellee entered the country regularly in 1904 and that he subsequently declared his intention to become a citizen of the country and has since resided in the country with no record of his having crossed our borders for any purpose whatever until

November 17, 1910, when he crossed the river to Windsor and on his return again passed immigration inspection after an examination in which he presumably satisfied those officials of his right to admission into the country, in that, he was a lawful resident of the country, having several years prior thereto lawfully and regularly without any fraud or deception passed immigration inspection and been admitted into the country, and, therefore, on the date in question was not amenable to the immigration laws.

Section 1 of Act approved February 20, 1907 (34 Stat., page 898), entitled "An act to regulate the immigration of aliens into the United States," reads in part as follows:

> "There shall be levied, collected and paid a tax of Four Dollars for every alien entering the United States."

It is evident from the absence in the record of any showing that Lewis was required to pay such tax that his right to enter and resume his domicile, unrestricted even to the extent of paying the head tax levied on aliens, was unquestioned. It is noteworthy also that any possible misstatements made by Lewis on this occasion had to do with another party and had no bearing whatever on his right to enter and that he again returned to his home and that it was from his home it was sought to deport him.

Parts of Act of February 20, 1907, as amended March 26, 1910, (36 Statute, page 263) entitled an act to amend an act entitled "An act to regulate the immigration of aliens into the United States approved February 20, 1907," which parts of said statute as are here involved are quoted as follows:

> "Sec. 2. That the following classes of aliens shall be *excluded* from admission into the United States: * * * Persons likely to become a public charge; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor,

involving moral turpitude * * *. Persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose * * * ."

"Sec. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import or attempt to import into the United States, any alien for the purpose of prostitution or for any other immoral purpose or whoever shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation or whoever shall keep, maintain, control and support, employ or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall, in every such case be deemed guilty of a felony * * *. Any alien *who shall be convicted* under any of the provisions of this section, shall at the expiration of his sentence be taken into custody and returned to the country whence he came or of which he is a subject or citizen in the manner provided in Sections 20 and 21 of this Act * * *."

I.

Jurisdiction of the Federal Courts on Habeas Corpus.

It will be noted that Sections 2 and 3 of Act approved February 20, 1907, are the only sections of the Act, amended by Act of March 26, 1910. It will also be noted by referring to Act approved February 20, 1907, that Section 29 of said Act reads as follows:

> "That the Circuit and District Courts of the United States are hereby invested *with full* and *concurrent jurisdiction* of all cases, civil and criminal, arising under the provisions of this Act."

It can not be urged that the courts are entirely without jurisdiction in immigration cases, or that in creating the

Department of Commerce and Labor, Congress intended to deprive the judiciary of its inherent and constitutional right to review errors of law in this particular class of cases, this right would still exist in the absence of express provision, but Congress wisely provided, in the Act itself that the Circuit and District Courts should be invested with full and concurrent jurisdiction.

In *re Panzara* (D. C.), 51 Fed., 275. It was held that the power of the federal superintendent of immigration to return passengers is confined to alien immigrants and the question as to who are of that class may be determined by the courts on habeas corpus, also that an alien who has acquired a domicile in the United States, returning from his native country after temporary absence, does not come within the class who may be denied admission.

See also in re Martorelli, 63 Fed., 437.
In re Maiola, 67 Fed., 114.
In re Ota, 96 Fed., 487.

In the case of *McNichols vs. Pease*, 207 U. S., 100, at page 109, it is held that habeas corpus is an appropriate proceeding for determining whether a person is within a particular class amenable to the statute and in *United States vs. Williams*, 173 Federal, 626, it is held that where the right of a person to enter the United States is claimed on the ground of citizenship and he is denied admission by the immigration officers, that the questions of law may be reviewed by the courts on habeas corpus.

We call attention also to *Ex parte Watchorn* (C. C. S. D., New York), 160 Federal, 1014.

The facts in this case are as follows: The alien first came to the United States in 1902 and returned to Italy his native country in 1905. He was arrested in 1908 under a warrant issued by the Acting Secretary of Commerce

and Labor, charging him with entering the United States without inspection and directing him to be brought before a board of special inquiry to show cause why he should not be deported for that reason. The acting secretary subsequently amended his original warrant so as to charge the alien of having been convicted of a felony or other crime or misdemeanor involving moral turpitude. The following is quoted from the opinion of the learned circuit judge:

> WARD, Circuit Judge, (page 1016): " * * * Passing over various objections I come to the one on which the case turns, namely, that the alien could not be found to be in this country in violation of law within three years of his entry in 1901, and was not convicted of a crime either before his original entry in 1901 or before his return after a temporary sojourn in Italy in 1905. Doubtless the determination of the immigration authorities upon all questions of fact even if made upon legally incompetent or inconclusive evidence, is final, but when the proceedings before them show indisputably that they are acting without jurisdiction, relief may be had by a writ of habeas corpus."

It was held, *Redfern vs. Halpert*, 186 Fed., 150 (C. C. A., 5).

That the decision of the Secretary of the Department of Commerce and Labor is not final and that the courts may inquire into the whole case on habeas corpus.

II.

Status of Alien Residents Who Have in Good Faith Acquired a Domicile in This Country.

A casual reading of a few late cases might give the impression that each re-entry into the United States after a temporary absence therefrom could be held to constitute an immigration into the country but a careful reading

of the cases in question or of any of the cases in which the point is raised, will not permit of such construction, for in nearly every instance the alien returned to the country of his nativity and citizenship or was guilty of having gained his first entrance fraudulently, whereas, in the case under consideration the alien had an established domicile and residence in the United States since September 20, 1904, having obtained his admission into the country legally and having maintained his domicile continuously from the date of his entry up to the present moment, it certainly can not be urged that the fact of his having crossed the river into Canada with no other object than that of meeting his wife and accompanying her to the immigration offices in this country constitutes an immigration into the country. Scores of Detroit manufacturing and business concerns maintain branch offices on the Canadian border and if every alien who is a resident of this country is under the constant surveillance and watchful eye of the immigration officers, no person whether citizen or alien could with safety cross over to Canada to his employment in any branch American concern, for he would have no assurance when going to work in the morning, that he would be permitted to return to his family at night.

The following is quoted from "Opinions of Attorney General, Volume 27, page 49:"

> "To the Postmaster General: *"
>
> "I am obliged to call your attention to the terms of Section 356 Revised Statutes of the United States, which provides that the head of any executive department may require the opinion of the Attorney General on any questions of law arising from the administration of his department. The well established practice of this department has been to consider this section as containing an implied prohibition against the giving of an opinion by the Attorney General under its terms unless upon a question of law and the question of law which has actually arisen * * *."

The following is from the opinion of the Attorney General to the Secretary of Treasury reported in Volume 22, Opinions of Attorney General, page 357:

> "* * * The word immigration means the act of immigrating, and to immigrate is to come into the country of which one is not a native, and in which one has not acquired a residence or domicile. The act of immigration is accomplished when the foreigner seeking a new home first comes into the country. After he has gained a residence with the rights incident thereto, a return to the country of his choice, following a temporary absence is not regarded as a second act of immigration."

From the opinions quoted above it appears that the question as to whether or not an alien returning to the United States after a temporary absence is an alien immigrant, is one of law, otherwise the Attorney General would not have favored the Secretary of the Treasury with an opinion and the opinion given to the Secretary of the Treasury unequivocally states that the alien on his return to the country after a temporary absence can not be held to be an alien immigrant.

As pointed out by Judge Denison inferences of law from undisputed facts are to be finally drawn by the courts and not by the department and two cases from the Second Circuit are cited: "Ex parte Saraceno, 182 Federal, 955; in re Nicola, 184 Federal, 322." (See Record, page 29, C. C. A., 2.)

In the case of *Redfern, et al., vs. Halpert*, 186 Federal, 150, C. C. A., 5th, the court said:

> "I have no doubt that the relator is a prostitute and that she was not a prostitute when she came to New York from Russia. There is no doubt that the Secretary of Commerce and Labor, would have the right to order her deported at any time within three years after her arrival, if she had been brought here for immoral purposes or was found within the same

period in a house of prostitution, therefore, the only question to be determined in this case is when does the three-year period begin to run * * *. I find nothing in the law, making the decision of the Secretary of Commerce and Labor final and I am satisfied I have the right to inquire into *the whole case* * * *."

"It is contended by respondent that in the instant case, the relator having come to the United States as a minor could not be considered as having come here with the intention of acquiring a domicile and therefore, has no status as a resident. I can not agree with this view of the case. It seems to me that no greater hardship could be occasioned than by deporting an alien who had come to this country at a tender age and had lived here until after majority. Deportation in such case is tantamount to exile. In my opinion the law must be held to mean that the three years' period within which an alien may be deported begins to run from the date of his first entrance into the country and temporary absence with the intention to return cannot interfere with his status as a resident nor give the immigration authorities the right to deport him."

The opinion of the learned circuit judge as above quoted not only covers the question as to when the three-year period within which an alien may be deported begins to run but touches also on that other very important question, namely the right of the courts to review errors of law of the Department of Commerce and Labor and the right the court has to inquire into the whole case.

Rogers vs. United States, 152 Fed., 346, C. C. A., 3rd Circuit.

"We are clearly of the opinion that an alien who has acquired a domicile in the United States cannot thereafter and while still retaining such domicile, legally be treated as an immigrant on his return to this country after a temporary absence for a specific purpose not involving a change of domicile. The term 'immigrant' as applied to him is a palpable

misnomer. * * * We think, however, that, notwithstanding the generality of the terms employed in the section, Congress did not intend that exclusion under the Act on account of loathsome or dangerous contagious disease should extend to aliens domiciled in this country. In reaching this result the body of the Act has been considered in its entirety in connection with its title and in the light of other statute *pari materia*. The title is 'An act to regulate the immigration of aliens into the United States.' Certainly if taken alone, it would indicate the inapplicability of the Act to the case of Buchsbaum. It is well settled that where the language of a statute is ambiguous or otherwise doubtful, or being plain a literal construction would lead to such absurdity, hardship or injustice, to render it irrational to impute to the law making power a purpose to produce or permit such result, the title may be resorted to as tending to throw light upon the legislative intent as to its scope and operation. *United States vs. Fisher*, 2 Cranch., 358, 386. 2 L. Ed., 304. *Holy Trinity Church vs. United States*, 143 U. S., 457. *Coosaw Mining Company vs. South Carolina*, 144 U. S., 550. Further, the body of the Act contains provisions of such a character as, in connection with the title, to lead us to conclude that the statute was not intended to apply to aliens having their homes in the United States."

The several cases cited by counsel for appellant in support of the contention that the three (3) year period within which an alien may be deported dates from re-entry into the country after a temporary absence are with the exceptions of Chinese cases (which obviously do not apply) decisions that were before the Circuit Court of Appeals, Fifth Circuit, 186 Federal, 150, March 14, 1911, when the case of *Redfern vs. Halpert* was passed upon.

We quote the following from the holding of the judge *a quo* which was also the holding of a majority of the judges in the C. C. A.:

"* * * In my opinion the law must be held to mean that the three-year period within which an

> alien may be deported begins to run from the date of his first entrance into the country and a temporary absence with the intention to return, can not interfere with his status as a resident or give the immigration authorities the right to deport him."

This case, it will be noted, in effect affirms the holding of the District Court in the case of *Sprung vs. Morton,* 182 Federal, 330, which case was in February, 1910, before the Circuit Court of Appeals, Fourth Circuit, 187 Federal, 903, and reversed.

We quote the following, however, from the opinion of the learned district judge in the case of *Bloom vs. Morton,* decided at the same time.

> "The courts must have the right to determine when persons have once been admitted into the country, apparently lawfully and properly whether they belong to the inhibited class or not. The Secretary of Commerce and Labor may have the right to say who shall be admitted, and as to them, doubtless his determination is final but, when persons have once become residents and citizens of this country, surely as to them he cannot have such authority and power, and the courts be deprived of all jurisdictions in matters effecting their liberty and right to remain in the country."

It was said with reference to the Sprung case:

> "The facts and testimony as viewed by the court in this case sustain the contention made by the petitioner: That she is the wife of an American citizen, and hence herself a citizen, and not a deportable subject. She came to this country as a single woman, some 15 years ago, being of Austrian birth. She did not belong to any inhibited class and her entrance was lawful, * * *."
>
> "The authorities are clear that being the wife of an American citizen her citizenship is that of her husband and she can not be deported, as they are also that the re-entry of an alien, once lawfully an inhabitant of the country, into the country, after

only a temporary absence, does not make her subject to deportation."

The Circuit Court of Appeals, Fourth Circuit, while reversing the District Court as to the limitation of time within which the department could act did not deny the right of the courts to review decisions of executive officials on questions of law.

Counsel for appellant also call attention to the following cases cited by Judge Denison:

United States vs. Aultman Co. (D. C.), 143 Fed., 923, affirmed in 148 Fed., 1022 (C. C. A. 6th);

In re Buschbaum (D. C.), 141 Fed., 221, affirmed in 152 Fed., 346 (C. C. A., 3rd); Rodgers vs. United States.

United States vs. Nakashima, 160 Fed., 842 (C. C. A., 9th.)

The facts in the Aultman case are that Hermann, whom it was sought to bring under the alien contract labor law came to this country from Germany in 1891 and remained in the country until the middle of July, 1902, when he went to Canada to help break a strike there. He remained in Canada two (2) weeks when he was called upon to assist in breaking a strike at Canton, Ohio. The questions passed upon by the District Court for the Northern District of Ohio and affirmed by the Circuit Court of Appeals, Sixth Circuit, was whether he was an immigrant within the meaning of the statute and amenable to the Contract Labor Laws when returning to the country from Canada after having left the United States for a period of two (2) weeks.

The learned district judge said:

"The ubroken current of authority is that he was not an immigrant within the meaning of this statute.

I doubt whether he would be an immigrant within the meaning of any statute."

As has been noted, this case was affirmed in 148 Federal, 1022 C. C. A., 6.

Counsel for appellant also call attention to the Buchsbaum case affirmed by the C. C. A., 3rd Circuit, *Rodgers vs. United States* and the *Nakashima* case (C. C. A., 9th Circuit.)

We quote the following from *Rodgers vs. United States:*

"* * * We are clearly of the opinion that an alien who has acquired a domicile in the United States can not thereafter and while retaining such domicile legally be treated as an immigrant on his return to the country after a temporary absence for a specific purpose not involving a change of domicile."

"In the case of *in re Maiola* (C. C.), 67 Fed., 114, Judge Lacombe held that the statutes relating to alien contract laborers including the act of March 3, 1891, would not any of them apply to an alien residing in the United States and returning here after a temporary absence abroad * * * ."

"* * * We are satisfied that Buchsbaum was not an alien immigrant at the time of his deportation under the provisions of Act of March 3, 1903, or any other statute of the United States. We are not aware of any decision in conflict with this conclusion."

UNITED STATES VS. NAKASHIMA.

(Circuit Court of Appeals, Ninth Circuit, February 27, 1908.) 160 Federal, 842.

Appellee in this case was a subject of the Emperor of Japan but had been for four years and more a resident of the United States, having in May, 1902, come from the Empire of Japan to the territory of Hawaii as an immigrant. From Hawaii he went to California where he established a home for himself and wife and remained there until November, 1904, when he returned to Japan to serve in the army. He

left his wife in California during his stay in Japan. When discharged from the army he proceeded to return to California, it being his intention to make his home there.

He stopped at Honolulu on his way back to California to visit a brother and sister who resided there and at Honolulu he was questioned by the immigration inspector and an examination of his mental and physical condition made by an officer of the United States marine hospital service, which officer certified that he was afflicted with a dangerous, contagious disease, to-wit, trachoma, whereupon the board, called for the purpose of giving appellee a hearing, determined that he was afflicted with a dangerous, contagious disease and ordered that he be deported to Japan. He appealed from the decision to the Secretary of the Department of Commerce and Labor and the appeal was dismissed, the secretary holding that no appeal was permissible.

The following is from the opinion of Gilbert, Circuit Judge, page 844:

> "The question first presented is, whether the appellee is of the class of aliens who are to be denied admission into the United States under Act March 3, 1903, C. 1012 32 Stat., page 1213, which excludes from admission all aliens who are afflicted with dangerous, contagious diseases. That act is amendatory to Act March 3, 1891, C. 551 26 Stat., 1084, which in its terms is amendatory of prior acts. The act of 1891 had uniformly been held to apply solely to alien immigrants, and not to affect the rights of alien residents."
>
> "* * * It is true the act of March 3, 1891, is in terms directed against all aliens, and does not, in Section 2, which defines the class of aliens to be excluded from admission employ the word immigrant or immigration nor does it employ those words in Section 9 which imposes a penalty on any person or transportation company bringing to the United States any alien afflicted with a loathsome or dangerous contagious disease. If the act were unaffected by the prior legislation, of which it is amendatory, there might be ground for saying from its inclusive language, that it is directed against all aliens coming to the United States; but

aliens have always been allowed to reside in the United States and acquire property here, while at the same time maintaining their citizenship in the country from which they came, and their right to return to the United States, after having temporarily left the same with the intention to return, has always been recognized * * *."

"That it is directed against alien immigrants and not against alien residents, has been decided in the following cases:

In re Buchsbaum (D. C.) 141 Federal, 221.

United States vs. Aultman (D. C.) 143 Federal, affirmed 148 Fed., 1022 (C. C. A., 6th) 922.

Rogers vs. United States, 152 Federal, 346, 81 C. C. A., 454 * * *."

Counsel for respondent refer to the above case and say:

"The court again was careful to explain that it assumed jurisdiction only because Nakashima had not been allowed an appeal to the Secretary of Commerce and Labor."

The following is quoted from the opinion:

"We are of the opinion that Section 25 of the Act of 1903 does not exclude jurisdiction of courts habeas corpus where the alien is denied the right of appeal upon a question effecting his right *to land* and upon which he should be heard."

It will be noted, however, that in this case as in the case of *Lem Moon Sing*, 158 U. S., 538, also cited by the District Attorney, the Court, in commenting on the finality of the decision of the department, referred to the same in connection with the decision of the immigration authorities on the right of the alien to land, not his right to remain in the country, after having been regularly admitted. In other words, there was involved the right to *exclude* an alien admittedly belonging to the excluded classes, not the right to deport an alien resident.

Exparte Petterson (D. C.) 166 Fed., 539.

The opinion was written by Purdy, District Judge. The following is quoted from his opinion as appearing on page 547:

> "Looking at the whole record, and making due allowance for the summary character of the proceedings before the immigration inspector when the petitioner was examined the court is unable to say that the petitioner's right to remain in the United States for the reason that she had acquired a domicile therein prior to her returning to Sweden has been established beyond any room for dispute or doubt, so as to warrant this court in holding that the Assistant Secretary of Commerce and Labor was mistaken with reference to a pure question of law. I, therefore, hold that the evidence contained in the record was of such a character as to justify the Assistant Secretary of Commerce and Labor in finding, *as in law* I assume that he found, that the petitioner did not belong to that class of aliens which by reason of acquiring a domicile in this country should be permitted to return unaffected by our immigration laws."

It is evident from the opinion of Judge Purdy as quoted above that the court had the right to review an error of law and also that there are a class of aliens who by reason of having acquired a domicile in this country are and should be permitted to return to the country unaffected by the immigration laws.

The following is also quoted from the opinion of the learned District Judge in the above case on pages 546 and 547:

> "In my opinion the petitioner has totally failed to make out a case which indisputably brings her within that class of aliens which the decisions in the Rogers and Nakashima cases, supra, hold to be beyond and outside of the immigration law of 1903. The burden was upon the petitioner to show, when she had the opportunity before the immigration officers, that she had acquired a domicile in the United States, which would necessarily arrest all further proceedings instituted with a view to her deportation."

Lau Ow Bew vs. United States, 144 U. S., 47, at pages 59, 61 and 63.

This is a writ of *certiorari* for the review of the judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the Circuit Court of Appeals for the Northern District of California in case of habeas corpus which determined that Lau Ow Bew, the appellant, is a Chinese person forbidden by law to land within the United States, and has no right to enter or remain therein, and ordered that he be deported out of the country.

It was stipulated and agreed that the following are the facts with reference to Lau Ow Bew's attempted entry into the country in 1891.

> "That on the 30th day of September, A. D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China with the intention of returning as soon as possible to this country, and returned to this country by the steamship Oceanica on the 11th day of August, A. D. 1891."

Section 6 of the Act of May 6, 1882, contains the provision that every Chinese person other than a laborer who shall be entitled to come within the United States shall produce a certificate from the Chinese Government or such other foreign government, at which time the Chinese person shall be a subject, identifying the alien, etc., as a person entitled to enter the country. It was held in the case of *Wong Tare vs. United States*, 181 Fed., 313, that by reason of the Chinese Exclusion Act Chinese laborers stand in a class by themselves but that Chinese merchants not coming under the Chinese Exclusion Act are subject to the immigration laws applicable to other aliens.

Mr. Assistant Attorney General Parker in his statement of facts in the Lau Ow Bew case said:

> "The petitioner left the United States September 30, 1890, and came into the Port of San Francisco, August 11, 1891, having been out of the United

> States more than ten months. During this time, he was living in the country of his birth and had resumed his domicile there, and had thus voluntarily placed himself within the operation of the statutes of the United States, excluding Chinese immigrants."

It will thus be noted that the Attorney General based his contention that petitioner had placed himself within the operation of the statutes excluding Chinese immigrants on the ground that he had returned to his native country and had resumed his domicile there.

Mr. Chief Justice Fuller delivered the opinion of the court and after discussing the question of jurisdiction, said:

> "We are brought, therefore, to the consideration of the questions arising upon the record. Lau Ow Bew came to the United States in 1874, and has been for 17 years a resident thereof, and domiciled therein, and during that period has carried on a wholesale and mercantile business in the City of Portland, Oregon. On September 30, 1890, he went to China for the purpose of visiting his relatives there with the intention of returning as soon as possible * * *. Does the act apply to Chinese merchants, already domiciled in the United States, who having left the country for temporary purposes *animo revertendi* and seek to re-enter it on their return to their business and their homes. Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention and if possible, so as to avoid an unjust or absurd conclusion. *Church of Holy Trinity vs. United States*, 143 U. S., 457; *Henderson vs. Mayor of New York*, 92 U. S., 259; *United States vs. Kirby*, 7 Wall, 482; *Oules vs. National Bank*, 100 U. S., 239."
>
> "* * * Chinese merchants domiciled in the United States and in China only for temporary purposes *animo revertendi* do not appear to us to occupy the predicament of persons 'Who shall be about to come to the United States,' when they start on their return to the country of their residence and business * * *. The general terms used should be limited to apply to them, and they would evidently be those

> who are about to come to the United States for the first time * * *. We are of the opinion that it was not intended that commercial domicile should be forfeited by temporary absence at the domicile of origin * * *."

Appellee entered the country at the Port of New York from Russia in 1904, his residence in this country has been continuous and uninterrupted since that time. It is true as has been stated *supra* he crossed the river into Canada November 17, 1910. He, however, as has also been stated, was admitted by the immigration inspector and returned to his home. It is evident from all legislation with reference to aliens domiciled in this country, that their right to acquire a home, and to accumulate property, and their right also to security under the laws of the country is not open to question, indeed as late an enactment as Act approved March 2, 1907, (34 Stat. 1228) provides:

> "That the Secretary of State shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years a passport may be issued to him, entitling him to the protection of the government in any foreign country." * * * Such passport shall not entitle the holder to the protection of the government in the country of which he was a citizen prior to making such declaration of intention."

Thus the right of an alien, resident of this country, to ask for and receive the protection of the government after he has resided in the country three years and has declared his intention to become a citizen of the country, while sojourning in a foreign country other than the country of his citizenship.

Appellee declared his intention of becoming a citizen of the United States, May 16, 1906. (See R., pages 17 and 18.) There is no reason to presume that he would not have

been granted a passport by the Secretary of State for protection of this government while in a foreign country, had he made application for same, and while this fact does not, it is conceded, determine the status of an alien in this country in such cases, it does in a measure determine his status as a resident of this country while in a foreign country and recognizes that on the broad principle of public policy he has acquired some rights akin to citizenship which the government recognizes, while he is abroad in the protection it affords him, and which it can not consistently disregard when he attempts to return to his own home here or while living peacefully in the country.

III.

Errors of Law by Executive Departments, May be Reviewed by the Courts.

It cannot be successfully maintained that Congress has ever intended or attempted the enactment of any statutes to deprive the judiciary of the inherent right therein vested to review errors of law by executive departments; to do so would be contrary to our whole scheme of government and would defeat the object of the framers of the constitution in providing that there shall be three separate and distinct departments of government, indeed the authorities appear to be unanimous in holding that erroneous conclusions of law by the Department of Commerce and Labor as of all other executive branches of our government are subject to judicial review.

As was said *Botis vs. Davis*, 163 Federal, 1001:

> "In no case, I think, has a departmental decision, not expressly made conclusive, ever been held to be so, as appears by Justice Brewer's dissenting opinion in the Juy Toy case, except that mere questions of fact will not be judically reviewed. Mistakes of law by executive officers are freely re-examined by the courts."

Gonzales vs. Williams, 192 U. S., 1.

Isabelle Gonzales, a citizen and native of Porto Rico, on arriving at a port in the United States was detained for deportation by the Commissioner of Immigration on the ground that she was an alien to be excluded within the meaning of the Act of March 3, 1891. The court recognized its jurisdiction to review the case and held:

That if she was not an alien immigrant within the intent and meaning of Act March 3, 1891, the Commissioner had no power to detain her and the final order of the Circuit Court must be reversed.

Counsel for appellant cite the case of *Bates & Gyld Company vs. Payne*, 194 U. S., page 106, and call attention to the fact that:

> "Where the law has confided to a special tribunal authority to hear and determine matters arising in the course of its duties, a decision by it within the scope of its authority as to questions of fact is conclusive against collateral attack."

The following is quoted from the opinion of the court:

> "That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact or of law alone, his action will carry with it a strong presumption of its correctness and the courts will not ordinarily review it although they may have the power and will occasionally exercise the right of so doing."
>
> "Upon this principle and because we thought the question one of law rather than of fact and one of great general importance, we have reviewed the action of the Postmaster General."

It seems that in reviewing this case, though, Justice Brown may be understood as saying that questions of fact by an executive department are conclusive and can not be reviewed by the courts. It is quite as clear that in his opinion questions of law are not conclusive and are subject to judicial review.

Counsel also cite *United States vs. Arredando*, 6 Pet., 691. This case while holding that where the power or jurisdiction is delegated to any public officer or tribunal over a subject matter and the acts done are binding and valid to the subject matter, it also holds that if "binding and valid" the officer or tribunal must have acted within the power conferred by statute. This case involves the title to land while the present case deals with the inherent and constitutional rights of an individual. It is proper also to note that in the present case the department was not acting within the power conferred upon it by ordering Lewis deported. As has been shown Section *2* of the Immigration Act was not applicable to him and Section 3 provides for deportation only in event of conviction.

The same applies to *Quinby vs. Conlan*, 104 U. S., 420, the court expressly holding that where a question of law is involved the courts have the right to interfere.

UNITED STATES VS. WILLIAMS.

(District Court, Southern District, New York, Oct. *29, 1909*) *173* Federal *626, pp. 627* and *628.*

It was held in this case, the opinion being written by Hand, District Judge, that where the right of a person to enter the United States is claimed on the ground of citizenship and he is denied admission by the Immigration Officers and the question of his citizenship depends on a question of law the same may be reviewed by the courts on a writ of habeas corpus.

See Ex parte Koerner, 176 Fed., 178.

Botis vs. Davies, 173 Fed., 996.

Gonzales vs. Williams, 192 United States, page 1, 24 Supreme Court, 171; 48 L. Ed., 317.

Ex parte Watchorn, C. C., 160 Fed., 1014, *supra.*

This case supports the contention that the courts are not precluded from reviewing errors of law on the part of the Department when it is sought to show that the person ordered deported is not within the inhibition of the statute.

See also United States ex rel Huber vs. Sibray, 178 Fed., 144.

The general rule is well recognized:

> "That decisions of the officers of departments upon questions of law do not conclude the courts, and they have no power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers."
>
> School of Magnetic Healing vs. McAmnulty, 187 U. S., 94, 108; 23 Supreme Court, 33.

Mr. Justice Pecham:

> "The Land Department of the United States is administrative in its character and it has been frequently held by this court that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department and its judgment thereon is final. *Burfenning vs. Chicago, etc. Ry. Co.*, 163 U. S., 321; *Johnson vs. Drew*, 171 U. S., 93; *Gardner vs. Bonestell*, 180 U. S., 362. While the analogy between the above cited cases and the one before us is not perfect, yet even in them it is held that the decisions of the officers of the department upon questions of law do not conclude the courts and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers."

The foregoing is sustained in a recent opinion of the Circuit Court of Appeals for the 2nd Circuit, in re Nicola, 184 Fed., 322.

EX PARTE KOERNER.

(CIRCUIT COURT, E. D. WASHINGTON, DECEMBER *15, 1909.*) *176* FED., *478.*

In this case the opinion is written by Whitson, District Judge, and from the facts as stated in opinion it appears that the petitioner entered the country on the 12th day of April, 1909, and was thereafter convicted of the crime of embezzlement in Austria, the country from which he came on the 8th day of October, 1909. He was detained for deportation upon a warrant issued November 9, 1909, by the Acting Secretary of Commerce and Labor under the Act of February 20, 1907 (34 Stat., 898). The clause of the statute under which the right to deport is claimed appears in Section 2 of the Act and reads:

> "* * * Persons who have been convicted of or admitted having been convicted of a felony or other crime or misdemeanor involving moral turpitude * *."

The following is quoted from the opinion of Judge Whitson as found on page 479:

> "The petitioner was sentenced to imprisonment in the penitentiary and, indulging the presumption that the law of the foreign jurisdiction is the same as this country, he was guilty of the commission of a felony and of a crime involving moral turpitude; but it affirmatively appears that he was convicted after he left Austria, and it not appearing that he has admitted the commission of the offense he is not brought within the statute, while the courts are bound by findings duly made by the executive branch in matters of this kind, (*United States vs. JuToy*, 198 U. S., 253, 25 Sup. Ct., 644; *Pearson vs. Williams*, 202 U. S., 281, 26 Sup. Ct., 608; *Oceanic Navigation Company vs. Stranahan*, 214 United States 321, 20 Supreme Court 671) they can not properly refuse relief, where upon the admitted facts it appears as a matter of law that the person sought

to be deported is not within the inhibition of the statute. *Gonzales vs. Williams,* 192 U. S., 1."

DEBRULER VS. GALLO

(CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.)
184 FED., *566.*

Ross, Circuit Judge. The following is quoted from the opinion.

> "The records contain a review by Inspector Fischer in his report made to the Department of Commerce and Labor of the evidence given in the cause; and his finding of fact made therefrom, and ultimate decisions of the Department, first herein set out. Under such circumstances we do not see how it can be properly held that the appellee was not given a fair hearing, by the officers of that department. Mistakes of law by executive officers are, of course, reviewable by the courts."

IV.

Finality of the Decisions of the Department of Commerce and Labor.

It being conceded, as we assume it must be, that errors of law by the Department of Commerce and Labor may be reviewed by the courts, it cannot be urged that the decisions of the Secretary of the Department on all questions relating to aliens are conclusive and final.

It is equally clear that any authority the Secretary may have must be found in the statute.

Certain it is that his conclusions of law are subject to review by the courts, and if erroneous, cannot be sustained.

The statute makes no provision for the deportation of an alien because he is thought to have imported a woman

for an immoral purpose, unless as provided in section three of the Act, the woman imported is an alien, and the party importing her has been convicted of so doing which under the law, in such case, constitutes a felony.

Ex Parte Saraceno (C. C.), 182 Federal, 955.

In this case the court exercised its authority to review the decision of the Secretary of Commerce and Labor.

> WARD, C. J. "The authority of the board, and the Secretary on appeal, to order the deportation of alien immigrants is confined to such aliens as come within the classes excluded by Section 2 * * * *. It is impossible to avoid the conclusion, that the real ground for the order is that the immigration authorities think the alien an undesirable citizen, which is a class not excluded by the immigration laws."

In re Nicola, 184 Federal, 322 (C. C. A., 2), Coke C. J.

> "It is conceded that the principal question involved is the same in each of these appeals, that question is whether the relators are citizens of the United States. If they are citizens it is manifest they cannot be refused admission into this country under the laws relating to aliens."

Botis vs. Davies (D. C.), 173 Federal, 996.

Botis was a Greek 18 years of age, held for deportation under the Contract Labor Statute. On November 11, 1908, a warrant for his arrest was issued setting forth that Botis was a contract laborer and a member of the excluded classes, in that, he migrated to this country pursuant to an offer, solicitation, promise or agreement made previous to such migration to perform labor herein. He was arrested and a hearing had, a copy of the evidence being attached to the return. The evidence was submitted to the Secretary of Commerce and Labor and being satisfied that Botis was

a member of the excluded classes in that, he is a contract laborer, the Secretary issued his warrant directing his return to his native country. He then sued out habeas corpus and the case was heard on the petition and return.

The following is quoted from the opinion of Sanborn, District Judge:

> "America means something to the immigrant whether he is from England or Sweden, little Russia or Armenia. Many a man now representing the best American manhood was, when he came to this country, though then perhaps of full age and stature, utterly unable to read or write. No industrious self-supporting immigrant should be cast out because of a technical infraction of a loosely drawn statute which has often been interpreted not to mean what it says * * *. Banishment, as Justice Brewer has well said, is a punishment of the severest sort and should not be inflicted in a case like this unless the law positively and equivocally demands it.
>
> "But it is said that these questions are wholly reserved to the political department with which the courts have nothing to do, and this is often a question of difficulty. There is nothing in the law which expressly makes the decision of those officers conclusive. Section 25 of the Acts of 1903 and 1907 both provide that when an alien is refused admission (never being allowed to land or only pending further examination) the decision of the appropriate immigration officials if adverse to the admission of such alien, shall be final unless reversed on the appeal to the Secretary of Commerce and Labor. Such appeal is provided for in the same section, but in the case of aliens who have been permitted to land and become in all respects subject to our jurisdiction and part of our population, but who are found within a limited time to fall within the excluded class, there is no express provision that the decision of the Department should be final."

Counsel for appellant have cited in their brief, several cases in which they point out, that it is held that the Secretary's warrant directing deportation is final on all questions.

A perusal of these cases will disclose, however, that they do not apply to the present case because they refer either to Chinese, which (*Rogers vs. U. S.*, 152 Federal at page 352) are *sui generis*,

> "involving the judicial or administrative enforcement of a particular policy on the part of the United States having as its object the prevention of competition between Chinese labor and other labor in the country,"

or to cases where *exclusion* rather than *deportation* is attempted,—and the reasons for excepting these classes of cases are apparent.

In the case of the Chinese immigrant it is obligatory upon him to prove by proper certificate, etc., that he is not in the country illegally if domiciled here. No presumption in his favor arises. His presence in the country raises a question as to its legality in view of the somewhat drastic exclusion Act. To one within the Act no rights could be acquired in the country, for in every such case his entry must have been illegal, and of aliens excluded or not permitted to enter in the first instance, the court has said (*Botis vs. Davies*, 173 Federal, at page 1002):

> "In one case the alien is stopped at our borders, and his entry arrested. He is simply turned back after an appeal and hearing, by an order which wholly concludes his rights. But in the other he enters the country, becomes a part of our population, perhaps acquires a domicile, pays taxes and establishes himself in business. * * * To the immigrant who never enters it may indeed be a great disappointment to be turned back; but to one who has earned a place here, who is supporting himself, possibly his family, with perhaps a home here, deportation is a punishment most drastic and severe. One may be rejected by peremptory order, final in its nature; the other is entitled to judicial investigation."

The strongest case cited by counsel for appellant on the question of the finality of the decision of the Department of Commerce and Labor would appear to be the case of *United States vs. Ju Toy*, 198 U. S., 253, but it will be observed that this case dealt with a statute expressly making such decisions final; the same is true of the other cases cited. Section 25 of the Immigration Act of February 20, 1907, does not apply to this case, however, and it appears from a careful reading of the cases, that where the case is not covered by the statute the decision is not conclusive. In passing upon a *positive provision* as in the Ju Toy, and other cases cited by appellant's counsel, the court was compelled to hold that "Adverse decisions should be final," as provided in the statute.

These aliens were stopped at the border whereas Lewis established his right to enter to the satisfaction of the officials—the same statute does not apply to the two classes of cases.

In the Rodgers case the learned District Judge was careful to quote that portion of Section 25 which reads as follows:

> "Such boards shall have authority to determine whether an alien who *has been duly held* shall be allowed *to land* or be deported."

The case of *Lem Moon Sing vs. United States*, 158 U. S., 541, cited by District Attorney and from which he quotes the opinion of Mr. Justice Harlan, came squarely under Act of August 18, 1894, which provided:

> "That where an alien is excluded from admission into the United States * * * the decision of the appropriate immigration or custom officers if adverse to the admission of such alien, shall be final, unless reversed on appeal."

It is obvious that it is not aplicable to the instant case for the reason that appellee was not excluded from admission.

Davis vs. Manolis, 179 Fed., 818; C. C. A., 7.

> "Nevertheless final determination of the statute applicable to the case and interpretation of the grant of power therein can not rest with the executive officer under any authority cited; nor can such finality of executive decision have sanction under our systems of government. Whatever may be the powers even of judicial nature vested in such officials for needful and summary enforcement of the governmental policy, we believe ultimate decisions of the fundamental questions above cited must remain with the courts."

Counsel for appellant have also quoted part of Section 25 of said Immigration Act as follows:

> "That in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made the decision of the appropriate immigration officers, if adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Commerce and Labor."

That this section does not determine the finality of the decision of the Secretary of Department of Commerce and Labor and that the same is inapplicable to the instant case will at once appear. It is not the right to come into the country that is here involved and consequently it is not necessary to consider the finality of the decision of the Secretary of the Department of Commerce and Labor in a case where an alien is excluded. Lewis was not *excluded* either in 1904 or 1910. There is not involved in this case the question of the right of an alien to enter or the finality of the decision of the department with reference thereto, but there is involved the right of an alien domiciled in the country, who having entered the country and regularly and satisfactorily passed the examination of the immigration officials to protection and safety in person and property

which right is guaranteed to all residents of the United States under the guarantees of the Constitution and the laws of the land.

V.

Interpretation of Statutes.

It will be noted from the record in this case that little or no evidence was offered before the immigration officers except to the charge of Lewis having brought a woman into the country for an immoral purpose and that little or no testimony was adduced as to any other allegations in the warrant, namely, that he had been convicted of or admitted having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that at the time of his entry he was likely to become a public charge or that he is unlawfully in the United States having entered without inspection. That the real ground on which Lewis was examined by the immigration officers and his deportation ordered by the Department of Commerce and Labor are found in Section 3 of the Act, is not only evident from the foregoing, but from the wording of the order to show cause why he should not be deported. (See R., page 4.)

> "Said Samuel Lewis, etc., was then informed that the purpose of said hearing was to afford him an opportunity to show cause why he should not be deported to the country from which he came." Not why he should not be *excluded* from entering the country.

It being thus admitted that Lewis was already in the country and that being a resident of the country he could not be excluded under Section 2 of the Act which reads as follows:

> "The following classes of aliens shall be excluded," etc., etc.

Appellee being lawfully in the country and a resident of the country and never having been held at the border could not be excluded under Section 2, but must necessarily come within Section 3, which provides for deportation only in case of conviction.

The following is an excerpt from the opinion of the learned District Judge (Record, page 27):

> "I am unable to find in the immigration law any authority whatever for deporting an alien because he has imported a woman for immoral purposes. Such importation might be fully proved, or, indeed, might be admitted by the alien, and still the department would have no jurisdiction to deport. It has jurisdiction only under Section 3, and that exists only in case of conviction.
>
> "I am led to this conclusion by study and comparison of Sections 2 and 3. Section 2 *excludes* from admission into the country a person who attempts to bring in a woman for immoral purposes. In terms, it applies only to excluding one who is attempting to get in, but it has been construed to be effective, by relation, in deporting those who had entered; and I accept that construction. Whether it could, in any event and standing by itself, be a basis for deporting an alien who had established and maintained a domicile in this country for six years, and in a case where the offense had nothing to do with the entry of the person to be deported, it is not necessary in this case to decide.
>
> "By Section 3, Congress has provided that where the woman imported is an alien and the person importing is an alien, a felony is committed; and that the person who is convicted of this felony may be deported. Under the general rules of statutory construction (*Noyes, C. J., in Wong Tun vs. U. S.*, 181 Fed., 313) the intent seems clear that out of the general class covered by Section 2, Congress has selected a particular class named in Section 3 and submitted it to a severe punishment, but, in connection therewith, has limited the right to deport to cases where there is a conviction.
>
> "The right to prosecute criminally and the right to deport are inconsistent, as concurrent rights; they

can not both be exercised at the same time; Congress saw the necessity of making the proceedings successive; and it clearly, and probably purposely, made the second step depend on the result of the first step."

The opinion of Judge Denison is fully supported by the case cited. *Wong Tun vs. U. S.*, 181 Fed., 313; C. C. A., 2nd Circuit.

This is a case decided June 14, 1910, reversing the District Court (176 Fed., 933). The facts briefly stated are: That the petitioners who are Chinese persons were taken into custody under warrants issued by the Department of Commerce and Labor charging them with being aliens unlawfully in the United States in that they entered in violation of Immigration Act of February 20, 1907. It was brought out at the hearing that the petitioners were laborers and therefore came within the Chinese Exclusion Law.

The opinion was written by Noyes, Circuit Judge.

"NOYES, Circuit Judge, '*Generalia specialibus non derogant*' is an elementary rule governing the interpretation of statutes. A later general statute which in its most comprehensive sense would include that which is embraced in an earlier particular enactment, does not, as a general rule, repeal the latter, but applies only to such cases within its general language as are not within the provisions of the particular Act. '*The general statute is read as silently excluding from its operation the cases which have been provided for by the special one.* Endlich on the Interpretation of Statutes, Section 223.'

"The application of this rule or interpretation is decisive of the present case. The Chinese Exclusion Acts deal with the removal of Chinese laborers unlawfully in this country and prescribe the procedure to be followed in deporting them. These statutes constitute comprehensive particular legislation with respect to that subject. It follows then, under the rule of interpretation, that the Immigration Act—the later general statute—although in its terms in-

cluding all aliens, applies, only to those Chinese aliens who are not subject to removal by the particular Chinese enactments and this is a case especially for the application of the rule, because the Immigration Act expressly provides that it shall not be construed as repealing, altering, or amending the existing laws relating to the exclusion of Chinese persons.

"It appears from the meager record that these petitioners are Chinese laborers and—if the government's contentions be well founded—that they are aliens and subject to deportation in accordance with the provisions relating to the Chinese. As we understand it, the government contends that the petitioners may be deported under either the Chinese Act or the Immigration Act, not that the former is inapplicable.

"If this contention of the government be well founded, we have two statutes in force prescribing different methods of procedure for the deportation of alien Chinese laborers. And the Immigration Act—if the government chose to act under it—would supersede the Chinese statute because it is evident that no Chinese laborer could come into this country unless he entered surreptitiously and without inspection. But any interpretation of the statutes would conflict with the rule which we have considered, under which both statutes do not apply to the same thing, but the later applies to those cases within its general language not within the provisions of the earlier; that is, as already pointed out, the Chinese statutes prescribe the procedure to be followed in removing alien Chinese laborers, while the Immigration Act states the procedure for the deportation of all other aliens unlawfully in this country including Chinese other than laborers. We think that these petitioners, being subject to removal according to the provisions of the Chinese Exclusions Laws, are not subject to removal in accordance with the procedure of the Immigration Act.

"This conclusion makes no distinction in favor of the Chinese. Chinese laborers are excluded by the Chinese Act. All other Chinese persons, not being excluded by that Act, are subject to the provisions of the Immigration Act. A Chinese laborer with or without a loathsome disease, cannot enter at all.

The Chinese Act governs the case. A Chinese merchant would not be excluded by that Act, but would be excluded by the Exclusion Act if he had a loathsome disease or other disability prescribed in such enactment.

"We fully approve the decisions in *Ex Parte Lee Sher Wing*, D. C., 164; Federal, 506, that the provisions of the Immigration Act excluding alien immigrants afflicted with certain diseases, etc., are applicable to Chinese immigrants otherwise entitled to admission. The distinction upon which the application of that Act depends lies in the difference in Chinese persons; between those who are, and those who are not, subject to Chinese Exclusion Laws. And we find no case in which the conclusions, as distinguished perhaps from general references to Chinese persons in the opinions, are inconsistent with this distinction.

"For these reasons, we hold that, as these petitioners appear to be subject to deportation in accordance with the enactments particularly relating to Chinese, they are not subject to removal under the provisions of the Immigration Act, and consequently are unlawfully held by process—either of arrest or deportation—issued under such act."

See Endlich on Interpretation of Statutes Sec. 223, at page 299.

VI.

Conclusion

It is not disputed that the courts have authority to, and do review errors of law by Executive Departments, including the Department of Commerce and Labor. As has been said heretofore, in all cases where the courts have held that the decision of the Department of Commerce and Labor is final, on appeal, the finality is given in the act itself which refers to excluding aliens from the country and does not apply to the present case. It is evident that the finality of the department's findings on appeal is intended only to save delay and enables the immigration

authorities to determine the status of an alien before he is permitted to enter the country and acquire a domicile here.

Counsel for appellant have quoted the following from Section 25 of Act approved February 20, 1907, Ch. 1134, 34 Stat., 907.

> "That in every case where an alien is *excluded* from admission into the United States under any law or treaty now existing or hereafter made, the *decision of the appropriate immigration officers*, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor."

And it has been attempted to bring this case under this section and the portion thereof above quoted. A further excerpt from the section will no doubt decide any possible question as to what class of cases are applicable thereunder.

> "Sec. 25. That such boards of special inquiry shall be appointed by the Commissioner of Immigration at the various ports of arrival as may be necessary for the *prompt determination* of all classes of immigrants *detained at such ports under* the provisions of law. Each board shall consist of three members, * * *.
>
> "Such board shall have authority to determine whether an alien who *has been duly held* shall be allowed *to land* or be deported * * * but either the alien or any dissenting member of the said board may appeal, * * * to the Secretary of Commerce and Labor * * *."

The section admits of but one construction. It applies as stated therein, to cases wherein is involved

> *"the prompt determination of all cases of immigrants detained at such ports;"*

to those cases wherein is involved the right of an alien *"who has been duly held to land,"* and to cases where the alien is excluded from admission. Obviously it can not be made applicable to the present case. Lewis was not duly

held, he was allowed to land and therefore, does not stand in the same class as the alien who is stopped at our border.

Here is a provision to save the delays incident to proceedings in court in dealing with aliens of the excluded classes who are "duly held" or are detained when seeking admission into the country. The several cases cited by counsel for appellant come squarely within such classes.

The District Attorney cites the case of *Taylor vs. United States*, 152 Federal 1 (C. C. A., 2nd). This case was reversed by the Supreme Court, 207 U. S., 120, and in commenting on the omission of the word "immigrant" the court said:

> "We see no reason to suppose that the omission meant to do more than to avoid the suggestion that no one was within the Act who did not come here with the intent to remain."

There appears to be no question that the courts have the same jurisdiction and authority to review and to determine the legal questions involved here as in any other cases passed upon by an administrative branch of the government.

Ex Parte Milligan, 4 Wall., 2.

> "The fact that the court can inquire by habeas corpus whether a person is within a class amenable to a particular jurisdiction has frequently been the subject of review by the courts, and would seem to be no longer open to controversy."

See also 207 U. S., 100.

Ex Parte Watchorn, C. C. 160 Federal, 1014.

This case is again applicable to the case before the court in this, that if it could possibly be maintained that Lewis was found guilty of or admitted the commission of a felony or of a crime involving moral turpitude in that he was fined $10.00 by a New York Police Judge 3 years after

his entry into the United States in 1904, but prior to his crossing the river from Windsor into the United States in 1910, it must be admitted that such offense was committed after he left Russia, the country to which he has been ordered deported.

As to the finality of the decision of an executive official on the application and interpretation of a statute the court said:

> "* * * Nor can such finality of executive decision have sanction under our system of government * * * we believe the ultimate decision of the fundamental questions above stated must remain with the courts."

Counsel for appellant have defined moral turpitude and have submitted authorities on what constitutes a felony or other crime or misdemeanor involving moral turpitude. We fail to see that on the record the question has any bearing on this case.

It was held *Ex Parte Saraceno*, 182 Federal, 955, that Saraceno who, prior to his entry to the United States had twice been arrested, being convicted on the second occasion of carrying a concealed weapon, that this was not an offense involving moral turpitude. And in *United States vs. Sibray*, 178 Federal, 152. The fact that the alien admitted that prior to his immigration he had committed a single act of adultery in the country from which he immigrated was not sufficient to support a warrant of deportation on the ground that he was an alien who committed or had committed a felony or other crime or misdemeanor involving moral turpitude.

The accusation that he is a person likely to become a public charge has no better foundation. The warrant was based upon his entry at Detroit from Windsor, Canada, November 17, 1910, at which time as the learned District Judge has said (Record, 16):

> "He was able bodied, industrious and self-supporting and nobody has suggested the contrary."

We have not been able to find in the Reported Cases after diligent search any instance where it has been held that an alien whose record shows not a single arrest before coming to this country, can be excluded or deported on the surmise that he may become a public charge as a result of arrest and imprisonment, and as Judge Denison has also said (R., 16) the proposition advanced by the department that he was likely to be arrested and convicted for bringing a woman into the country contrary to law and so become a public charge is collateral to the importing charge and must stand or fall with it.

Counsel for appellant cite the case, *Williams, Immigration Commissioner vs. United States, ex rel., Bougadis*, 186 Fed., 478 (C. C. A., 2).

Bougadis, it is said, gained admission to the country by falsely representing himself to be a citizen. He was discharged on habeas corpus proceedings on an order from the Circuit Court for the Southern District of New York on the sole ground that a verdict of acquittal had been directed by the Circuit Court for the Eastern District of New York, after trial upon an indictment charging that he had obtained admission to the United States by falsely representing himself to be an American citizen.

It will be noted that the court in this case recognized its jurisdiction to review the *whole case* on appeal from the Circuit Court where relator had been discharged in habeas corpus proceedings, otherwise the court would not be in position to say:

> "The department charged with the administration of the law has decided on *ample evidence*, that the appellee was improperly admitted to this country."

It is evident that the Circuit Court of Appeals exercising as it did jurisdiction to review the whole case and from the record to determine that the department had decided

on "ample evidence that appellee had been improperly admitted," to all intents and purposes by this finding reversed the learned Circuit Judge who directed a verdict of acquittal.

The following also is quoted from the opinion:

> "There can be no doubt whatever that the appellee came here under the name of Dimitrios Papos and secured admission as a citizen by falsely representing himself to be Dimitrios Papos, and presenting naturalization papers issued to said Papos."

In other words, Bougadis secured admission to the country by fraud as was also the case of *Looc Shee*, 170 Federal, 566, and this, as we understand it, is the real gist of the case upon which the Circuit Court of Appeals bases its decision. The finding by the Circuit Court of Appeals that there was fraud and that there was ample evidence to warrant the department to hold that the appellee was improperly admitted to the country must have been found in the record of the proceedings before the immigration authorities, as filed in the case on appeal to the Circuit Court of Appeals.

The case stands in a similar class to those where the authorities may exclude the alien at the border. It being true that appellee gained admission to the country fraudulently it can not be said that he ever actually gained admission at all, and therefore not being in position to profit by his own fraud, could acquire no rights which the government was bound to respect by reason of having a domicile in the country. He falsely represented himself to be a citizen; had his representation been true, he would not have been subject to exclusion or deportation for any cause whatever. Fraudulent representations as to citizenship and the presenting of naturalization papers made it possible for the alien to gain admission without the inspection contemplated by law and such admission being thus gained by fraud could confer no rights upon him.

A review of the record filed by the District Attorney in the present case in which record is found the evidence on which Lewis was ordered deported by the department discloses that unlike Bougadis, Lewis did not gain admission to the country by fraud either at the time of his actual entry in 1904 or when he crossed the river November 17, 1910. No evidence was taken November 17, 1910, as to his fitness, or as to misrepresentations as to himself, whereby he gained admission in 1904. Any possible misstatement on November 17, 1910, as to his wife, could not effect his own right to return to his domicile. It is conceded that he was admitted on the last occasion by the authorities because of his showing of having passed inspection and been lawfully admitted in 1904. It is not questioned that the statements made with reference to himself were true, as appears in the record. Obviously it can not be maintained that Lewis gained admission by any fraud or artifice, and certain it is that it cannot effect his right to return to his domicile here that any other party may, or may not, have attempted to gain admission by misstatements, it matters not by whom such misstatements were made. The department must have exercised its imagination incredibly to arrive at the conclusion that an alien gains admission to the country fraudulently, who (on returning to the country after less than an hour's absence therefrom, having resided peaceably five years prior thereto, and having gained admission in the first instance regularly and lawfully) makes possible misstatements as to another party who is seeking admission.

No statute has yet been passed making ordinary prevaricators subject to exclusion or deportation.

WARRANT VOID.

U. S. Ex Rel Huber vs. Sibray, 178 Fed., 144.

The warrant of arrest in this case recited that Hans Huber, alien.

"who landed at the port of New York, per S. S. Pretoria, on the 4th day of October, 1907, has been found in the United States in violation of the act approved by Congress February 20, 1907, to-wit, that the said alien is a member of the excluded classes, in that he imported a woman for an immoral purpose, and that he has been convicted of or admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States."

Of the warrant, Orr, District Judge, said:

"I am constrained to hold that the charge is not sufficiently specific. It is not required that the warrant of arrest should have the formality and particularity of an indictment but it should give to the alien such information of the specific act or acts which bring him within the excluded classes, so that he can offer testimony in refutation of the charge at the hearing directed to be had by the warrant of arrest in pursuance of the Act of Congress and the rule of the department. What woman is he charged with importing and for what immoral purpose? Was he convicted of or did he admit commission of a crime? Was it a felony or other crime or misdemeanor involving moral turpitude? If either which was it? By paragraph B, Rule 35, as has been seen, a full statement of the facts must be the basis of the warrant. It is contemplated, therefore, that facts, and not conclusions, must be set forth in the warrant."

The department have arrested Lewis on a warrant in which it has been attempted to bring him within the class of excluded aliens as set forth in Section 2 of the Immigration Act approved February 20, 1907, as amended March 26, 1910. It will be observed, however, that the warrant under which he was arrested is open to the same criticism complained of by the learned District Judge in the case above quoted. Lewis is charged with having been convicted of and admitted having committed a felony or

other crime or misdemeanor involving moral turpitude prior to his entry into the United States. That he is a person likely to become a public charge; that he secured admission into the United States by false and misleading statements thereby entering without the inspection contemplated by law and that he procured, imported and brought into the United States a woman for immoral purposes. With the exception as to the charge with reference to the woman the record does not show to what, any of the other accusations are intended to refer.

Appellant's counsel have commented on the proposition that in the Department of Commerce and Labor is vested the power to expel aliens who, having entered the country, are found to be here unlawfully.

The real ground on which appellee was held to be unlawfully within the country, was that he is an alien, who had imported a woman into the country for an immoral purpose, any other accusation entitled to consideration being collateral thereto. This Count having failed, he was not in the country unlawfully and could not be deported, not having been convicted, as provided in Section 3, which is an element necessary to support the deportation warrant.

Finally it should be noted that appellee in this case is ordered deported to Russia. The entire case is based on the occurrence of November 17, 1910. His entry from Russia was in 1904. In a similar case *United States, ex rel., Ruiz vs. Redfern*, 186 Fed., 603, Foster, District Judge, said:

> "The Immigration Laws clearly contemplate the deportation of aliens to the country whence they came when they illegally entered the United States, regardless of their nativity. The only exception is when an alien intending to enter the United States for the convenience of his voyage lands first in foreign territory contiguous to the United States. I do not find that the Secretary of Commerce and Labor has any

discretion whatever in the matter, and any warrant that attempts to exercise such discretion is necessarily illegal and void."

The decision of the learned District Judge should be sustained.

Respectfully submitted,

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Counsel

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GUY W. MOORE,
H. P. WILSON,
Attorneys for Appellee.

DATED DETROIT, MICHIGAN, ~~OCT. 30TH, 1911~~.

Mar 11-1912

LEWIS *v.* FRICK, UNITED STATES IMMIGRATION INSPECTOR.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 208. Argued January 28, 1914.—Decided April 6, 1914.

Where an alien enters this country more than once, the period of three years from entry prescribed by §§ 20 and 21 of the Alien Immigration Law runs not from the date when he first entered the country, but from the time of his entry under conditions within the prohibitions of the act. *Lapina* v. *Williams*, 232 U. S. 78.

Where, as in this case, there was evidence sufficient to justify the Secretary of Commerce and Labor in concluding that the alien was within the prohibitions of the Alien Immigration Act, and the hearing was fairly conducted, the decision of the Secretary is binding upon the courts.

Under § 2 of the Alien Immigration Act of 1907 as amended in 1910, it is an offense for any person, citizen or alien, to bring into this country an alien for the purposes of prostitution, and any alien so doing or attempting to do may be excluded on entry or deported after entry.

A conviction under § 3 of the Alien Immigration Act is not necessary

for exclusion on entry or deportation after entry of an alien who has brought into this country an alien for the purpose of prostitution, nor is a verdict of acquittal of a charge under § 3 *res judicata* as to a proceeding before the Secretary under § 2 of the act.

There is a distinction between a criminal prosecution and an administrative inquiry by an Executive Department or subordinate officers thereof. *Zakonaite* v. *Wolf*, 226 U. S. 272.

The destination of an alien whose deportation after a second entry is based on § 2 of the Alien Immigration Act is to be determined in the light of §§ 20, 21 and 35 of the act and is not controlled by the factitious circumstance of his going to a contiguous country to obtain the alien brought in for purposes of prostitution. The act admits of his being returned to the country whence he came when he first entered the United States.

Quære, whether the act leaves any room for discretion on the part of the Secretary; and whether that part of a deportation order determining destination of the alien is open to inquiry on *habeas corpus*.

195 Fed. Rep. 693, affirmed.

THE facts, which involve the construction of the provisions of the Alien Immigration Act in regard to deportation of undesirable aliens, are stated in the opinion.

Mr. Guy W. Moore, with whom *Mr. Frederic S. Florian*, *Mr. Philip T. Van Zile* and *Mr. H. P. Wilson* were on the brief, for petitioner.

Mr. Assistant Attorney General Wallace for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

Petitioner is an alien and a native of Russia. He came thence to this country, entering at the port of New York, in the month of September, 1904, lived in or near New York City until March, 1910, then removed to Detroit, Michigan, and has since made that city his home. On November 17, 1910, he crossed the river from Detroit to Windsor, Canada, and brought back with him into the United States a woman, avowed by him to be his wife, but

whose actual status was questioned, as will appear. A few days later he was arrested upon a warrant from the Department of Commerce and Labor, issued under the Immigration Act of February 20, 1907, as amended March 26, 1910, and after a hearing conducted by an inspector, the Secretary, on February 14, 1911, found "That said alien is a member of the excluded classes, in that he . . . procured, imported and brought into the United States a woman for an immoral purpose," etc., and thereupon ordered that he be deported to the country whence he came, to wit, Russia.

Meanwhile, he was indicted in the United States District Court for a violation of § 3 of the Act, the charge being that on the occasion above referred to he knowingly imported an alien woman from a foreign country for an immoral purpose, to wit, illicit concubinage and cohabitation. The trial of the indictment resulted, on March 23, 1911, in a verdict of not guilty.

On April 13th petitioner, being in custody under the deportation warrant, sued out a writ of *habeas corpus* from the United States Circuit Court. Appended to his petition for the writ was a copy of the record of his examination by the inspector, including the testimony and a list of exhibits but not the exhibits themselves. In his answer the immigration inspector set up the warrant of deportation as his authority for detaining petitioner, and recited the arrest and examination, and the finding of the Secretary of Commerce and Labor.

The Circuit Court held that there was no authority in the immigration law for deporting an alien because he had imported a woman for immoral purposes; that such importation might be fully proved, or, indeed, might be admitted by the alien, and still the Department of Commerce and Labor would be without jurisdiction to deport; that it had such jurisdiction only under § 3 of the Act, and only in case of conviction; that because by § 3 Congress

provided that where the woman imported is an alien and the person importing is an alien, a felony is committed, and the person convicted of this felony may be deported, therefore under the ordinary rules of statutory construction it must be held that out of the general class covered by § 2 Congress had selected a particular class named in § 3, and subjected it to a severe punishment, but in connection therewith had limited the right to deport to cases where there was a conviction. That the right to prosecute criminally and the right to deport are inconsistent as concurrent rights, and cannot both be exercised at the same time; and that Congress saw the necessity of making the proceedings successive, and clearly made the second step depend upon the result of the first. Hence, an order was made for the discharge of petitioner. 189 Fed. Rep. 146.

Upon appeal, the Circuit Court of Appeals reversed this judgment, 195 Fed. Rep. 693, holding that the power to deport an alien existed under §§ 2 and 21 of the act, irrespective of § 3; and further that the right to deport in this case could be found in § 3 in connection with § 21, without regard to conviction or acquittal under § 3. The court also held that the acquittal of Lewis was not *res judicata* of the present proceeding, and that since there was evidence tending to support the finding of the Secretary of Commerce and Labor respecting the bringing in of the woman for the purpose of prostitution, that finding was conclusive. And, finally, it sustained the deportation of petitioner to Russia rather than to Canada, holding that the former was "the country whence he came," within the meaning of the act.

The provisions that are especially pertinent are set forth in the margin.[1]

[1] "An Act To regulate the immigration of aliens into the United States," approved February 20, 1907, c. 1134, 34 Stat. 898, as amended by act of March 26, 1910, c. 128, 36 Stat. 263.

The decision of the Circuit Court of Appeals is attacked here on several grounds. The first is based upon the fact that the alien had an established domicile and residence in the United States dating from September 20, 1904, having obtained his admission into the country legally, and maintained a domicile here continuously from the date

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"SEC. 2. That the following classes of aliens shall be excluded from admission into the United States . . . persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose. . . .

"SEC. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, . . . shall, in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. . . . Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections twenty and twenty-one of this act. . . .

"SEC. 20. That any alien who shall enter the United States in violation of law, . . . shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. . . .

"SEC. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this Act. . . .

"SEC. 35. The deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this Act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

of his entry until the time of his arrest; and it is insisted that the fact of his having crossed the river into Canada, even though it was done with the object of bringing a woman into this country for the purpose of prostitution, did not bring him within the reach of the Immigration Act or subject him to the summary procedure therein prescribed.

This question is settled adversely to the contention of petitioner by our recent decision in *Lapina* v. *Williams*, 232 U. S. 78. That case arose under the act of February 20, 1907, while this arises under the same act as amended March 26, 1910. But the changes are not such as to affect the authority of that decision upon the present point.

In *Lapina* v. *Williams* it did appear that the alien had practiced prostitution for many years before her temporary departure from the country, and that she not only returned with the intent to continue the practice but did almost immediately engage in it, and continued it until her arrest under the provisions of the Immigration Act. But the real ground of decision was that Congress in the act of 1903 sufficiently expressed, and in the act of 1907 reiterated, the purpose of extending the prohibition against the admission of aliens of certain classes, and the mandate for their deportation, to all aliens within the descriptive terms of the excluding clause, irrespective of any qualification arising out of a previous residence or domicile in this country. This view was based (a) upon the legislative history of the act of 1903 (from which the material provisions of the 1907 act were taken), which was a reënactment of previous laws, but with the deliberate omission of the word "immigrant" and of certain other qualifying phrases that had been construed by the courts as giving so limited meaning to the word "alien" as not to include aliens previously resident in this country and who had temporarily departed with the intention of returning; (b) upon the clear language of the excluding clause of § 2

of the act of 1907 (quoted in full, 232 U. S. 91); (c) upon the fact that none of the excluded classes (with the possible exception of contract-laborers) would be any less undesirable if previously domiciled in the United States; and (d) upon the fact that the section contains its own specific provisos and limitations, which, upon familiar principles, tend to negative any other and implied exception.

We hold, therefore, that the fact that the petitioner, Lewis, had been domiciled for six years or more in this country, he remaining still an alien, did not change his status so as to exempt him from the operation of the Immigration Act; and that if he departed from the country, even for a brief space of time, and on reëntering brought into the country a woman for the purpose of prostitution or other immoral purpose, he subjected himself to the operation of the clauses of the Act that relate to the exclusion and deportation of aliens, the same as if he had had no previous residence or domicile in this country. In short, the period of three years from entry, prescribed by sections twenty and twenty-one, runs not from the date when the alien first entered the country, but from the time of the prohibited entry; that is to say, in the present case, the entry made by the alien when bringing in the woman.

The next question is whether there was sufficient evidence to fairly sustain the finding of the Secretary of Commerce and Labor to the effect that petitioner did on November 17, 1910, import and bring into the United States a woman for an immoral purpose. Upon this question, petitioner's contention was and is, that the woman is in fact his wife. He testified that he married her in Warsaw shortly before he came from Russia to this country, and that when he brought her across the river from Windsor he intended that he and she should live together in Detroit as husband and wife. The conten-

tion of respondent was and is, that the story of the marriage was a pure fabrication, resorted to in the effort to conceal the fact that the woman was a prostitute and imported by petitioner for immoral purposes. There is much in the evidence to support this view. Petitioner admitted that his real name was not Lewis, but Prezysuskier, and his "other name" was Nossek; that he first used the name of Lewis after coming to this country; that his father's name was Chaskel Prezysuskier; that he knew his alleged wife as "Leah," and did not know her other name, if any; that he knew her father as "Isaac," but did not know whether he had any other name; that two friends were present at the ceremony, but he could not remember their names; that he lived with the woman in Warsaw for five or six months, and then separated from her because he heard stories of improper conduct on her part, and that he afterwards heard she had had children before the marriage. Being questioned concerning his life in New York he professed himself unable to give the names of several persons among those with whom he said he had come in contact, and who could presumably have been called either to corroborate or to contradict his testimony. He declared that he had not seen his alleged wife since coming to America until the occasion when he met her at Windsor. Being asked "How did you happen to meet her at that time?" he answered as follows: "I was home not working one day and Berman comes up and asks for me and I don't know how he got my address and I was surprised that a strange man should ask for my name but my cousin, Mrs. Newman, told him he should come back at night when I got home from work and he came back and said 'I have regards for you' and he said, 'Are you Lewis' and I said 'Yes' and he asked me questions, if I was ever in Warsaw and I said 'Yes,' and he said, 'I have regards from your wife' and I pretended to say that I haven't got any, because I kept myself single, but still

when he mentioned the name I knew what it was and I said, 'Where is she, what does she want of me' and he s. 'She is not here, she is in Canada, but I will let you know ... she gets here.' On the 17th I went to work in the morning and at dinner time when I got back Mr. Berman was there waiting for me. I said, 'What is the matter' and he said, 'I received a telegram that my wife and your wife are coming here and I want you to come over with me to Windsor and meet them,' and I said, 'She will come over to the Immigration Office they should send for me over there and she could get out.' Well he said it was better for me to come over there, 'For you know how a woman is'; he said, 'She might make you trouble' and I didn't think about it, so I went there and met her and I went over to Windsor and stood there 15 or 20 minutes and got a train to the station at Windsor and met her there but very cool and came over here to the Immigration Office."

The story is extraordinary. How it happened that the alleged wife, who had known him as Prezysuskier in Warsaw, was able through the good offices of an entire stranger to identify him as Lewis, in Detroit, more than six years later, was not explained. The alleged husband's readiness to accept her is equally suspicious. There were other circumstances tending to discredit the story of the marriage. And if that story fell, the inference of an unlawful purpose was irresistible. It should be mentioned that the exhibits introduced upon the examination on which the warrant of deportation was issued are not included in the record; but it does appear that among them was a statement made by the alien at police headquarters in Detroit on November 21, 1910. Were there doubt whether the testimony itself, without the documentary evidence, would support the action of the Secretary of Commerce and Labor, we should be inclined to say that a court ought not to set aside that action without at least requiring the

production of the exhibits that were presented to the Secretary. But, without regard to them, enough appears to show that he was fully justified in concluding as a matter of fact that the whole story of the marriage in Warsaw was a fabrication, and that in truth Lewis went from Detroit to Windsor upon information from which he inferred that the woman was an alien and a prostitute, willing to accompany him to Detroit for an immoral purpose, and that he brought her to Detroit for that purpose.

This being so, and there being no contention that the hearing was not fairly conducted, the finding of the Secretary upon the question of fact is binding upon the courts. *Low Wah Suey* v. *Backus*, 225 U. S. 460, 468; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275.

Respecting the construction of the act, we cannot assent to the view entertained by the Circuit Court. Section 2 declares that certain classes of aliens shall be excluded from admission into the United States, and among them "persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose." This section applies only where an alien brings in a woman or girl for the purpose indicated. It does not declare that the woman or girl need be an alien. Section 3 prohibits the importation of "any alien" for the purpose of prostitution or for any other immoral purpose. Of course, in order to constitute an offense against this section, the person brought in must be an alien. But the person need not be a woman or girl. This is clear from the changes made by Congress in § 3 when amending it in 1910. The section as it stood in the 1907 act (34 Stat. 898, 899, c. 1134) forbade and rendered felonious the importation or attempt to import "any alien woman or girl for the purpose of prostitution, or for any other immoral purpose"; the phrase "alien woman or girl" being repeated in other

clauses of the section; and one of the principal changes made in 1910 (36 Stat. 263, 264, c. 128) was to eliminate the words "woman or girl," so that now the section prohibits the importation of "any alien" for the purposes referred to, and declares that whoever shall import or attempt to import "any alien for the purpose," etc., or shall hold or attempt to hold "any alien" for any such purpose, etc., or shall keep, etc., in pursuance of such illegal importation "any alien," shall be deemed guilty of a felony. The purpose of the amendment is not to be mistaken. Moreover, the offense is made a felony irrespective of whether it is committed by an alien or by a citizen of this country, the only difference being that by one of the clauses any alien convicted under this section is, after the expiration of his sentence, to be returned to the country whence he came, or of which he is a subject or a citizen.

Again, § 20 provides: "That any alien who shall enter the United States in violation of law" shall be deported "at any time within three years after the date of his entry into the United States." This certainly includes those who enter in violation of § 2; indeed, violators of § 3 may not have "entered" at all, within the meaning of the Act.

Consequently, we deem that the Circuit Court erred in holding that the Act does not provide for deporting an alien for the offense of procuring or attempting to bring in prostitutes, etc., in the absence of a conviction for the felony under § 3. Section 2, read in connection with §§ 20 and 21, is not thus conditioned. And, as just now pointed out, the offense aimed at in § 2 and that which is punishable under § 3 are not the same. In short, it cannot be said that out of a general class covered by § 2, Congress selected the particular class named in § 3, for the latter class is not entirely included within the former.

We agree with the Circuit Court of Appeals that the

verdict and judgment acquitting petitioner under the indictment does not render the present controversy *res judicata*. The issue presented by the traverse of the indictment was not identical with the matter determined by the Secretary of Commerce and Labor. And, besides, the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused. The distinction between a criminal prosecution and an administrative inquiry by an Executive Department or subordinate officers thereof has been often pointed out. *Zakonaite* v. *Wolf*, 226 U. S. 272, 275, and cases cited; *Williams* v. *United States*, 186 Fed. Rep. 479.

The final contention is that petitioner should have been deported to Canada, whence he came upon the occasion of his unlawful entry into this country, rather than to Russia, the land of his birth, from which he came six years earlier. By § 20, the alien is to be "deported to the country whence he came at any time within three years after the date of his entry into the United States;" by § 21, the Secretary of Commerce and Labor, upon being satisfied that an alien is subject to deportation, "shall cause such alien within the priod of three years after landing or entry therein [within the United States] to be taken into custody and returned to the country whence he came, as provided by section twenty of this Act;" by § 3, an alien convicted thereunder is at the expiration of his sentence to be "returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections twenty and twenty-one of this Act;" and by § 35, "The deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarka-

tion was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

Petitioner not having been convicted under § 3, his destination is to be determined rather in the light of §§ 20, 21, and 35. And first, we take it to be clear (notwithstanding the peculiar phraseology of § 20) that the three year period limits only the authority to deport, and does not affect the determination of the country to which an alien is to be deported. Respecting this matter, the sections are somewhat lacking in clearness. But, at least, § 35 indicates a legislative intent that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports, if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country. This was recognized by Rule 38 of the Immigration Regulations, in force December 12, 1910.

It is to be noted that the classes of aliens who are subject to deportation are not wholly made up of those who enter in violation of the law; in some cases cause for deportation may arise after a lawful entry. And in many cases the unlawfulness of the entry may not be discovered until afterwards. The theory of the Act, as expressed in § 2, is that the undesirables ought to be excluded at the seaport or at the frontier; but §§ 20, 21, and 35, recognize that this is not always practicable. Of course, if petitioner's attempt to bring a woman into the country for an immoral purpose had been discovered in time, he might have been physically excluded from entry at Detroit upon his return from Windsor. In that event he would naturally have remained upon Canadian soil. But since his offense was not discovered in time to permit of his physical exclusion, so that he becomes subject to the provisions for deportation, his destination ought not to be controlled by the factitious circumstance that he went into Canada to procure the prostitute. And, upon the whole, it seems to

us that the Act reasonably admits of his being returned to the land of his nativity, that being in fact "the country whence he came" when he first entered the United States. See *Lavin* v. *Le Fevre*, 125 Fed. Rep. 693, 696; *Ex parte Hamaguchi*, 161 Fed. Rep. 185, 190; *Ex parte Wong You*, 176 Fed. Rep. 933, 940; *United States* v. *Ruiz*, 203 Fed. Rep. 441, 444. We need go no further, and may therefore leave undecided the question whether the Act leaves any room for discretion on the part of the Secretary of Commerce and Labor.

We have assumed, without deciding, that that part of the deportation order which determines the destination of the alien is open to inquiry upon *habeas corpus*.

Judgment affirmed.

SINGER SEWING MACHINE COMPANY *v.* BRICK-